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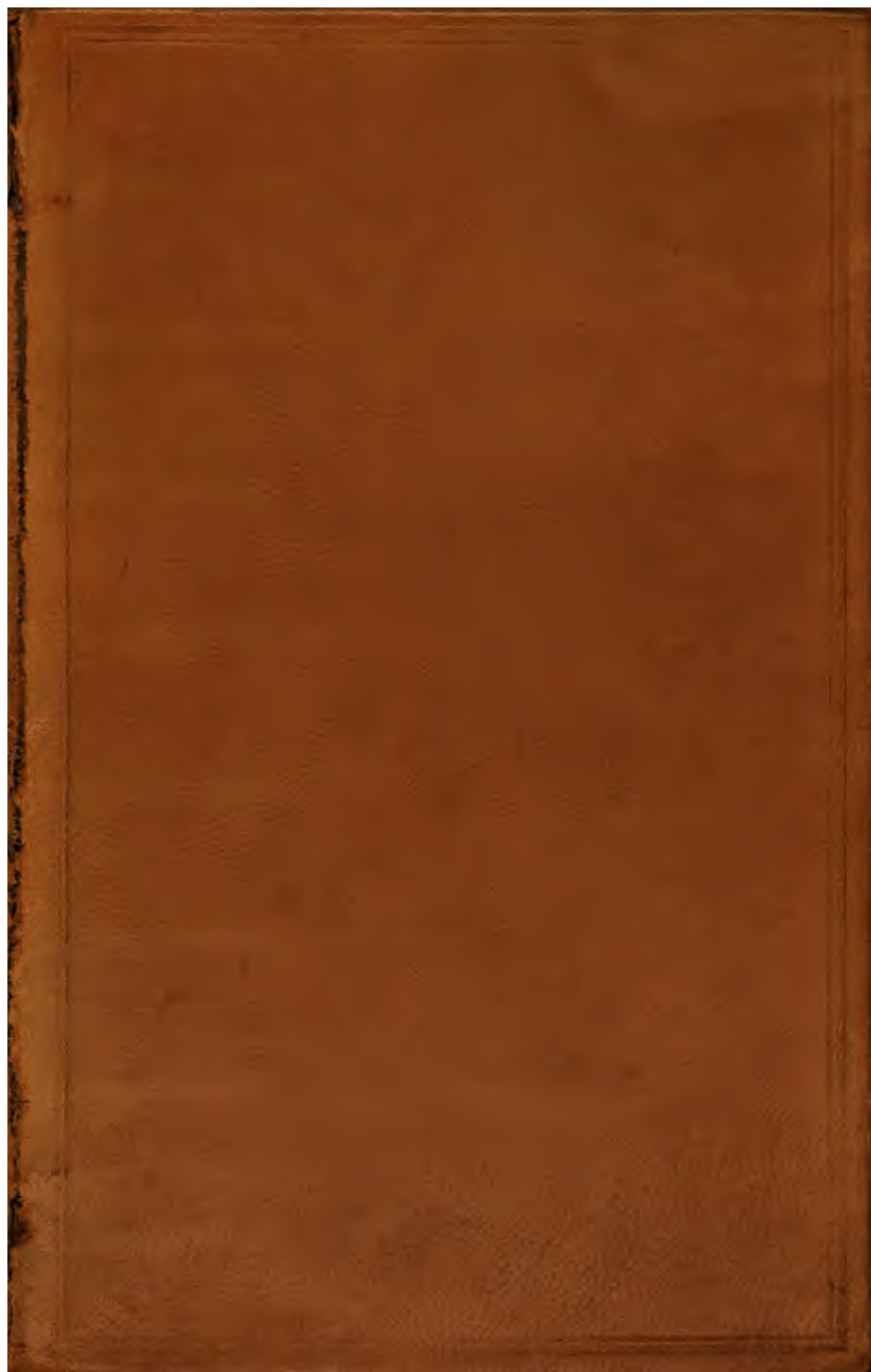
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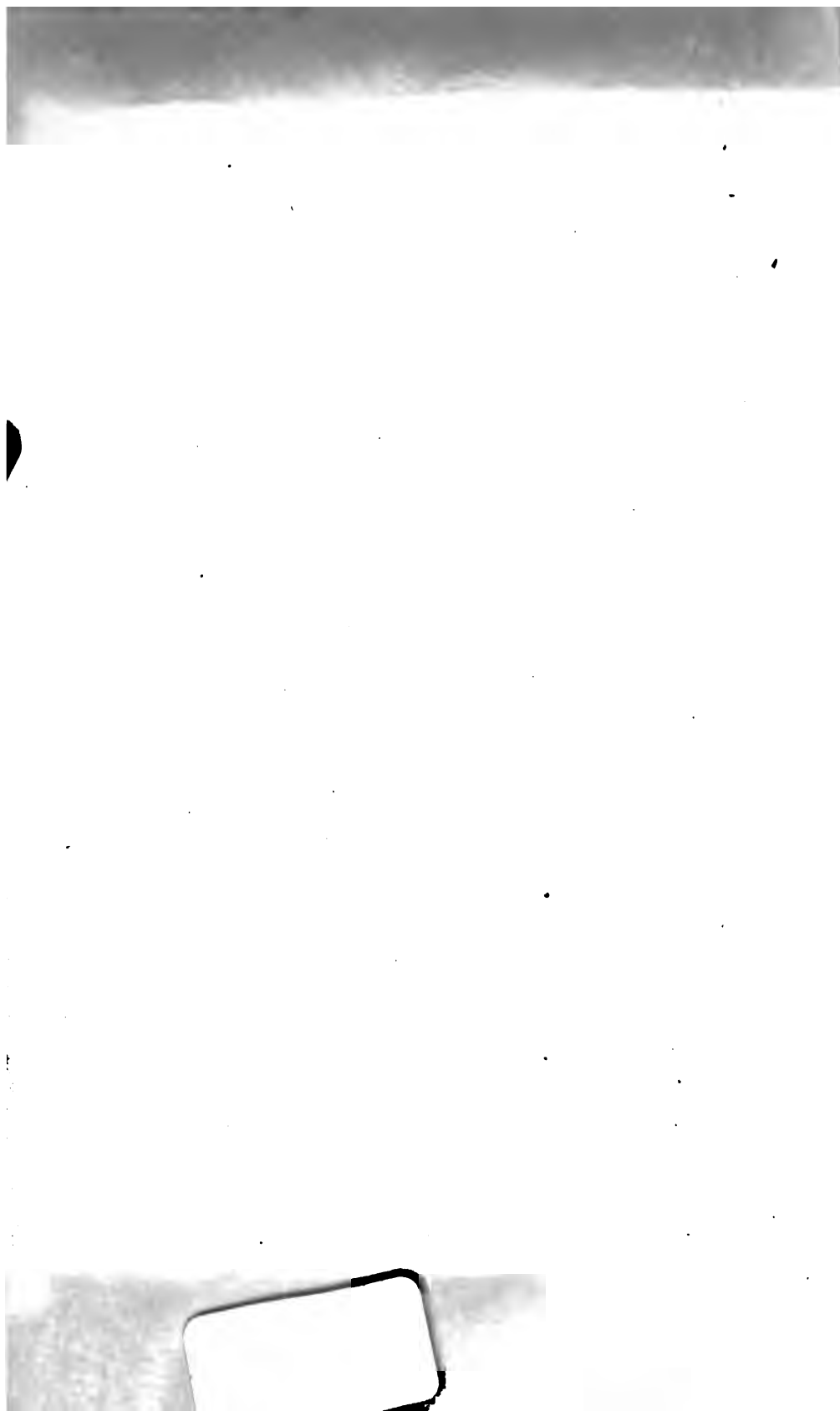
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RAILROAD REPORTS

(Vol. 55 American and English
Railroad Cases, New Series)

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT

IN THE
UNITED STATES.

EDITED BY

THOMAS J. MICHIE.

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RAILROAD REPORTS

PORTER *et al.* v. ABERDEEN & R. F. R. R.

(Supreme Court of North Carolina, Oct. 28, 1908.)

[62 S. E. Rep. 741.]

Eminent Domain—Occupation of Land—Owner's Remedy—"Permanent Damages."*—Where a railway company has entered land under a claim of right to do so, and has constructed a road thereon, and is operating it under a legislative charter, ejectment does not lie to oust it, and it cannot be subjected to successive actions of trespass; the owner's remedy being an award of permanent damages including recovery for the entire wrong, past, present, and prospective, and, on payment of such damages, an easement passes to the company as in condemnation proceedings.

Trespass—Damages—By Whom Recoverable.†—The right to recover for a trespass is personal to him owning the land at the time, and does not pass to his grantee.

Eminent Domain—Remedy of Landowner—Trespass—Parties.—In an action against a railway company for trespass upon land in constructing and operating a road over it, all who have an interest in the recovery and whose presence is necessary to protect the company from other and further recoveries for the same cause should be parties; since permanent damages must be adjudicated, on the payment of which an easement passes to the company as in condemnation proceedings and hence, one who owned and was in possession of the land at the wrongful entry, and who holds the present title, and others who owned the land when the action was brought, are necessary parties, though such other persons will not be required to file a complaint.

Appeal from Superior Court, Cumberland County; Long, Judge.

Action by John Porter and others against the Aberdeen & Rock Fish Railroad. From a judgment dismissing the action, plaintiff John Porter appeals. Reversed.

The action was to recover damages against defendant company for unlawful entering upon lands of the plaintiffs, and

*See extensive note, 15 Am. & Eng. R. Cas., N. S., 409; first foot-note appended to *Kakeldy v. Columbia, etc., R. Co.* (Wash.), 17 R. R. 480, 40 Am. & Eng. R. Cas., N. S., 480.

†See last foot-note appended to *Kakeldy v. Columbia, etc., R. Co.* (Wash.), 17 R. R. 480, 40 Am. & Eng. R. Cas., N. S., 480.

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wrongfully occupying same in the exercise of a right of way. The plaintiffs H. B. and C. B. Porter having failed to file any complaint, the action as to them was dismissed, and the cause proceeded with as between plaintiff John Porter and the defendant. Said plaintiff developed his case, and offered evidence tending to show that he was the owner and in possession of the land at the time of the alleged unlawful entry thereon, and that he owned and was in possession of same at the time of trial. It further appeared that said plaintiff had no title to the land in question at the time the action was instituted, to wit, on August 18, 1904, having at that time conveyed the portion of land affected by defendant's entry and occupation to his sons and coplaintiffs, H. B. and C. B. Porter, who reconveyed to their father, John Porter, after the action was instituted. When it was disclosed on cross-examination of plaintiff John Porter that he had no title to the land at the time of action instituted, the cause was dismissed by the court; the judgment entered being as follows: "This cause coming on to be heard at this term of the court before the court and a jury, and it appearing from the testimony and evidence introduced by plaintiffs that at the time of the institution of this action H. B. Porter was seised and possessed of one part of the land described in the complaint, and that C. B. Porter was seised and possessed of another portion of the land described in the plaintiff's complaint, being the lands occupied by defendant for its roadbed and right of way, and that the plaintiff John Porter was not at the time of the commencement of this action seised or possessed of any portion of the strip of land described in the complaint, and it further appearing that no complaint was ever filed in this action by said H. B. Porter or by C. B. Porter, who were joined as parties plaintiff in the summons, it is now on motion of Robinson & Shaw, attorneys for defendant, considered and adjudged: That this action be dismissed as to H. B. Porter and C. B. Porter, and that it further appearing that, since the commencement of this action, the said H. B. Porter and C. B. Porter have conveyed said land to the plaintiff John Porter, who was not seised or possessed of the same at the time of the commencement of this action, it is further considered and adjudged that this action be dismissed as to the plaintiff John Porter, and that the defendant, the Aberdeen & Rock Fish Railroad Company, go hence without day and recover of the plaintiffs and the sureties upon their prosecution bond the cost of this action, to be taxed by the clerk." Plaintiff excepted and appealed.

Sinclair & Dye, J. Sprunt Newton, and C. W. Broadfoot, for appellant.

Robinson & Shaw, for appellee.

HOKE, J. (after stating the facts as above). While the facts

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are not fully developed, we think from a perusal of the pleadings and the evidence stated in the case on appeal it appears by fair intendment that in 1902 the defendant company entered on the lands in question, claiming the right to do so, and have constructed their railroad, and are operating the same, under and by virtue of a legislative charter, and on facts substantially similar we have held in *Beasley v. Railroad*, 147 N. C. 362, 61 S. E. 453, that, under the circumstances indicated, a railroad company cannot be ousted from the land by action of ejectment on the part of the owner, nor subjected to successive and repeated actions of trespass; but the remedy for the wrong, if one has been committed by the entry and occupation of the land, is to be redressed by an award of permanent damages. On a former appeal in that same cause, reported in 145 N. C. 272, 278, 59 S. E. 62, Connor, J., speaking to this same question, delivered the opinion of the court as follows: "The plaintiff is entitled to recover of defendant a fair compensation for the injury done his land by entering upon it and constructing the railroad. When this is fixed and paid, the defendant will acquire the easement to use the land in the same manner, for the same purpose, and to the same extent as if it had acquired the easement by condemnation." It was formerly held as indicated in *Beasley's* second appeal, reported in 147 N. C. 362, 61 S. E. 453, that where the damages suffered by the owner would be included under an assessment in condemnation proceedings, and such a method of redress was provided by the charter or the general law, such method should be pursued. This was so held chiefly for the reason that it was considered unwise and improper that an enterprise of this character, in which the public as well as the stockholders had a vital interest, should be harassed and hindered, and have its success jeopardized by numerous and repeated actions, when full redress could be afforded in one and the same proceeding. At the time of those decisions, such a result could only be reached by condemnation proceedings, provided usually by charter or the general law. Since the same result is now accomplished by confining the owner, when suit is brought for the injury done to recovery of permanent damages for the entire wrong, there is no longer any reason why either method of redress should not be pursued. The intimations to the contrary therefore in *Beasley's* second appeal may be considered as withdrawn. Again, it was held in *Beasley's* second appeal that, while the term "permanent damages" includes damages for the entire injury done the property, present, past, and prospective, there is no good reason why this amount should not be ascertained by a verdict on different issues, when occasion requires that such a course should be taken. And it is further a well-recognized position with us that when there has been a wrongful entry and trespass on an owner's land, and such owner

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afterwards conveys the land to another, the right to recover for this wrong is personal to him who owned the land when the same was committed, and does not pass to the grantee. *Liverman v. Railroad*, 114 N. C. 692, 19 S. E. 64; *Drake v. Howell*, 133 N. C. 168, 45 S. E. 539.

A proper application of these principles to the facts presented requires that the order made by the judge below, dismissing the action as to H. B. and C. B. Porter for want of a complaint, and dismissing the action of John Porter as on judgment of nonsuit, should both be reversed. The court having decided that permanent damages, including recovery for the entire wrong, past, present, and prospective, should be had in one action; and that, on payment of such recovery, an easement should pass to the road as in proceedings in condemnation, all who have an interest in the recovery, and whose presence is necessary to protect the railroad from other and further recoveries for the same cause, should be made and retained as parties. John Porter has an interest in such a recovery, and is a necessary party, both as being owner and in possession at the time of the original and wrongful entry and as present holder of the title, and H. B. and C. B. Porter are entitled to share in such recovery for the portion of the injury suffered while they were owners. The court will not require them to file a complaint if they do not care to insist on their claim, but their presence in the suit is necessary to protect the defendant road from other and further litigation. When the road pays the permanent damages, the easement should pass, and, as stated, all whose presence is necessary to insure this result and protect the company from further action concerning it should be parties. The order dismissing the action as to C. B. and H. B. Porter is reversed, and these persons will again become parties of record; and the order dismissing the action as on judgment of nonsuit is reversed, and the cause will be proceeded with in accordance with law.

Reversed.

HELMER v. COLORADO, S. N. O. & P. R. Co.

(Supreme Court of Louisiana, Oct. 19, 1908.)

[47 So. Rep. 443.]

Eminent Domain—Damages Recoverable.*—Under article 167 of the Constitution of 1898, which provides that "private property shall not be taken nor damaged for public purposes without just and adequate compensation first paid," the right of recovery includes damages to property caused by noise, smoke, vibrations, etc., incident to the operation of a railroad, which permanently depreciates the value of the property, the amount to be determined by the difference between the market value before the road was built and the market value afterwards.

(Syllabus by the Court.)

Case certified from Court of Appeal.

Action by Robert M. Helmer against the Colorado, Southern New Orleans & Pacific Railroad Company. Judgment for plaintiff, and defendant appeals to the Court of Appeal. Case certified, and elements of damage determined.

Edward Benjamin Du Buisson, for plaintiff.*Dudley Louis Guilbeau*, for defendant.

LAND, J. Plaintiff sued the defendant company for damages to his property alleged to have been caused by the construction and operation of its railroad in front of his premises. It appears from the statement that plaintiff claimed as an element of damages the diminution of the market value of his property caused by the rumbling of trains, noises, emission of smoke, ringing of bells, etc. Our learned Brothers certify that:

"The sole question presented for instruction is whether the annoyance and discomforts caused by the noises, emissions of steam, etc., incident to the management of railroad trains, and which have contributed to a diminution in the market value of the property, enter as elements of damage for which the company is liable when claimed with other damages above enumerated, though contributing to the depreciation in the value of the property, and, though claimed with other damages, are *damnum absque injuria*."

The other damages claimed are for the impairment of the means of egress and ingress, thereby rendering the property less accessible.

As showing the contention of counsel for plaintiff, we make the following excerpt from the statement of the case, to wit:

"Plaintiff admits that as a general proposition damages can-

*See extensive note, 2 R. R. R. 214, 25 Am. & Eng. R. Cas., N. S., 214.

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not be recovered when they are caused by ringing of bells, emissions of steam, rumbling of trains, and such annoyances incident to the management of railroad trains, but contends that, when these causes contribute together with the damages resulting from the construction of the railroad track to the diminution of the market price of the property, and when these damages are claimed together, they enter into the elements of damages recoverable against the company."

We must confess that we cannot understand this line of reasoning. The cause of alleged damage is the same, whether standing alone or joined with other causes.

Article 167 of the Constitution of 1898 reads:

"Private property shall not be taken nor damaged for public purposes without just and adequate compensation first paid."

Article 156 of the Constitution of 1879 reads the same. In *Griffin v. Railroad Company*, 41 La. Ann. 808, 6 South. 624, the Supreme Court of this state construed article 156 to cover "all cases where private property has sustained a substantial injury from the making and use of a public improvement, whether the damage be direct, as when caused by trespass or physical invasion of the property or consequential as in a diminution of its market value." In that case the cause of damage was the obstruction of the street so as partially to cut off access to the property. The court cited *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638, where the damage was occasioned by a viaduct in a public street.

The same court in *McMahon v. Railroad Company*, 41 La. Ann. 827, 6 South. 640, held that the exercise by a railroad company of its legal right to construct and operate its road was subject to the restriction imposed by article 156 of the Constitution of 1879, and that the court had simply to inquire "what damage has been done to the property; i. e., to its value for rental or sale." The court further said:

"Mere consequential injuries to the owner arising from discomfort, disturbance, injury to business, and the like remain, as they were before, *damna absque injuria*, particular sacrifices which society has the right to inflict for the public good."

The true question in any given case of this nature is whether the causes complained of have substantially damaged the value of the property by diminishing its market value for rental or sale. The amount of damage is determinable by the difference between the market value before the road was built and the market value afterwards. *Railroad Co. v. Wolf*, 148 Fed. 961, 78 C. C. A. 589. In the same case it was held that the right of recovery includes damages to the property from noise, smoke, cinders, and vibration of the ground which permanently depreciates its value, the amount to be measured by the difference of market value as just stated. In the same case the charge to the jury that, "in

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respect of smoke and the noise of railroad operation, there must be an injurious effect upon plaintiff's lot in the mind of a good-faith purchaser, and not a mere personal inconvenience to the occupants," was approved by the appellate court. This case arose under the Constitution of Nebraska, (article 1, § 21), which provides that "the property of no person shall be taken or damaged for public use without just compensation," and the decision was in accord with the settled jurisprudence of that state. We think that the doctrine thus announced is in accord with our own jurisprudence, and necessarily results from the plain language of article 167 of our state Constitution.

We therefore answer that noise, smoke, vibrations, etc., incident to the operation of defendant's trains in front of plaintiff's property are elements of damage to be considered, if the market value of plaintiff's property is thereby diminished, the amount of damages to be determined by the difference between the market value before the road was built and the market value afterwards.

SPOKANE, P. & S. RY. CO. v. BALLINGER et ux.

(Supreme Court of Washington, Oct. 14, 1908.)

[97 Pac. Rep. 739.]

Railroads—Right of Way Agreement—Option—Acceptance.—Defendants on December 26, 1906, signed an agreement, in consideration of \$1 paid and \$899 to be paid on the execution of a deed, to convey on plaintiff's written request within six months a certain right of way. The agreement authorized plaintiff to enter and construct its road across the premises in the meantime, and, if plaintiff failed to exercise the option to purchase within six months, the agreement should be void. Held, that the effect of such instrument as an option was not changed into an agreement to sell freed from the conditions of the option as to time and payment by a letter written to defendants on January 4, 1907, notifying them of the railroad company's election to accept such agreement.

Same—Time of Essence.—An option for the conveyance of a railroad right of way authorized the railroad company to immediately enter and construct its road, and provided that, if it failed to exercise the option and make the payment agreed upon within six months, the agreement should be null and void. Held, that time was of the essence of such contract, and the railroad company, having failed to exercise the option by making the prescribed payment within the time, could not compel performance thereof, though it had entered and expended much money in construction.

Same—Condemnation.—Where a railroad company failed to exercise an option for a right of way within the time prescribed, the fact

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that it had expended much money in construction on the strip, as authorized by the agreement, did not estop the owners from declaring the option forfeited; the railroad company being entitled to save such expenditures by exercising its right of eminent domain.

Appeal from Superior Court, Spokane County; Miles Poin-dexter, Judge.

Suit by the Spokane, Portland & Seattle Railway Company against I. J. Ballinger and wife. Decree for complainant, and defendants appeal. Reversed and dismissed.

Merritt, Oswald & Merritt, for appellants.

Cannon & Lee, for respondent.

DUNBAR, J. This is an action to compel specific performance of an agreement for the sale and purchase of a railroad right of way, entered into by appellants and respondent. The agreement consists of a right of way option and letter of acceptance. The right of way agreement was as follows: "In consideration of the sum of one dollar to us in hand paid, the receipt of which is hereby acknowledged, and the further sum of eight hundred ninety-nine and no-100 dollars, to be paid on the execution of the deed hereinafter mentioned, we have agreed, and by these pres-ents do agree, on written request, within six months from date, to sell and convey to the Portland and Seattle Railway Company, a Washington corporation, free and clear of all encumbrances a right of way for its road over and across [here follows descrip-tion], and, upon payment of said sum of nine hundred dollars (\$900.00), we agree to make a good and sufficient deed to said company for said right of way, the company to have the right to enter and construct its road across said premises in the meantime. (Should the said company fail to exercise this option to purchase said right of way within six [6] months from the date hereof, then this agreement to be null and void.) Said company to provide one surface crossing and one 6-foot arch for the passage of stock under the track of said road, this agreement as to the arch subject to di- vision engineer's approval. In witness whereof, we have here- unto subscribed our names this 26th day of December, 1906. I. J. Ballinger. Elizabeth Ballinger. In presence of Geo. I. Hinck- ley." This right of way agreement was entered into on the 26th day of December, 1906. On the 4th of January, 1907, the re- spondent sent to the appellants what it terms its acceptance of the option, which was as follows: "Spokane, Washington, January 4, 1907. I. J. Ballinger, Esq., And Elizabeth Ballinger, Cheney, Washington—Dear Sir and Madam: Referring to right of way agreement made with each of you on December 28th, 1906, by which you agree to convey to Portland and Seattle Railway Company a right of way over the west half of the northwest quar-

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ter of section ten, the east half of the northeast quarter of section nine, twenty-two, forty-one. On behalf of the Portland and Seattle Railway Company, I beg to advise you that the same is hereby accepted and we will be prepared to make payment agreed and take title to the right of way strip. Yours truly, W. C. Sampson, Right of Way Agent." Upon failure to pay the amount of money stipulated, the appellants notified the respondent that it (the respondent) had no interest in the land, and demanded possession of the same. The respondent entered into the possession of the land, and expended a large amount of money in constructing the road. After the notification to respondent by the appellants that it had no further interest in the land, the respondent tendered to the appellants the stipulated price for the land and demanded a deed, which was refused. This action was commenced in August, 1907, by the respondent to procure a restraining order by which appellants were restrained from interfering with respondent's possession of said real estate and constructing a railroad thereon. The trial court found, among other things, the agreements as set forth above; that time was not of the essence of the contract for the purchase and sale of said lands; that respondent was entitled to the exclusive possession of said right of way strip, and to a specific performance of the contract. Judgment was entered in accordance with these findings, and appeal followed.

The trial court evidently based its judgment on the assumption that the acceptance of the option by the respondent changed the transaction between the parties from an option to an agreement to sell, binding upon both parties to the agreement and enforceable by either, and that this acceptance by the respondent destroyed and annulled the conditions of the option contract, else it could not have found that the payment of the purchase price was not a condition precedent, and that time was not of the essence of the contract. In this we think the court erred. An option is a common and familiar method of securing the right to buy land, the purchaser paying a certain amount with the privilege of forfeiting that amount if he does not see fit to pay the full purchase price agreed upon on or before a stipulated time. The conditions are plain and easily understood. If the purchase price is paid or tendered within the time specified, the obligation of the vendor is to give a deed. If it is not, no obligation whatever rests upon him. The limitation has been fixed by the parties, and it is as binding as any statutory limitation. It is difficult to see how the plain provisions of this option contract could be annulled by the announcement by the respondent that the agreement was accepted. Most certainly it was accepted when the \$1 consideration was paid and the agreement to sell upon certain conditions was executed by the appellants. Can it be that the mere notification of acceptance stripped away all the appellants' rights under the

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contract, and left them nothing in return? The contract specially provides that, should the said company fail to exercise the option to purchase the right of way within six months, the agreement should be null and void. This certainly made time the essence of the contract, if time can be made the essence of a contract. Now, what is meant by the words "fail to exercise," etc.? This question is answered by the respondent in its note of acceptance, viz.: that it would be prepared to make the payment agreed and take title. There is nothing to indicate that it would accept some of the conditions of the option contract and abrogate others; but it accepted them all. It seems to us that this letter of acceptance neither added to nor took away anything from the contract, and was certainly entirely useless. But if it was necessary by its reference to the contract and its acceptance of the conditions therein expressed, it must be held to have accepted all the conditions of the contract, and that is all there is in this case. The respondent entered into an option agreement to pay a particular price at a definite time, and it allowed the time to expire. The appellants' contention is plainly sustained by the authorities cited, viz.: *Neeson v. Smith* (Wash.) 92 Pac. 131; *Waterman v. Banks*, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479; *Lockwood v. Anderson*, 116 Iowa, 236, 89 N. W. 1072; *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, 6 L. R. A. (N. S.) 406; and many other cases. The respondent attempts to distinguish these cases, but in this we think it is unsuccessful; for, while in some of the cases the circumstances were of necessity different, the principles announced sustain the appellants' right to forfeiture.

Great stress is placed upon the fact that appellants suffered the respondent to enter into possession of the land and to expend a large amount of money thereon, and it is claimed that for this reason they should be estopped from demanding a strict compliance with their contract. If we have placed a proper construction upon the contract, it follows that the respondent went upon this land and made expenditures at its own peril. This may be a hardship, but it is always a hardship for a person purchasing an option to lose the payment when the option expires. Sometimes the amount paid for the option is small and sometimes it is large, but this is only a matter of degree. The legal consequences are always the same. Possession can in no way change the conditions of the contract in reference to the time of payment. That was a matter which was fixed by the contract. If as a matter of accommodation to the respondent the appellants allowed it to take possession of the land, they should not now be deprived of any right they have under the contract. We think there is no element of estoppel shown anywhere in the record; and neither are we able to discern any special hardship in the case. The respondent need not lose its expenditures, but, failing to perform the con-

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ditions of the contract, it must be relegated to the exercise of the right of eminent domain, if it desires the possession of the land.

The judgment will be reversed, and the action dismissed, with costs to the appellants.

FULLERTON, CROW, ROOT, and RUDKIN, JJ., concur. HADLEY, C. J., and MOUNT, J., not sitting.

HENRY v. MASON CITY & FT. D. R. Co. et al.

(Supreme Court of Iowa, Nov. 19, 1908.)

[118 N. W. Rep. 310.]

Municipal Corporations—Use of Streets—Franchises—Construction.

—Under the general rule that franchises and licenses are to be strictly construed in the grantor's favor, franchises to use streets are to be so construed.

Contracts—Construction—Practical Construction.—The practical construction given a contract or grant by the parties thereto is of great weight on a judicial construction.

Railroads—Franchises in Street—Construction.—A franchise to a railway company to maintain "its railroad track" along a street, under which franchise it laid a single track, did not authorize the company to lay an additional track 16 years later, where the damage done abutters was based on the maintenance of a single track, and where the grant was practically construed by the city authorities as giving the right to maintain a single track only.

Eminent Domain—Tracks in Street—Damage—Rights of Abutters.*

—Additional railroad tracks laid in a street entitle the abutter to additional damages when they are not provided for or contemplated at the time of the original assessment of damages.

Appeal from District Court, Wright County; C. C. Lee, Judge

Action to recover damages to real property. There was a judgment for the defendant, from which the plaintiff appeals. Reversed.

Peterson & Knapp, for appellant.

Birdsall & Birdsall and *Healy & Healy*, for the appellees.

SHERWIN, J. The plaintiff is the owner of certain lots abutting upon Manson street, in the town of Clarion, Iowa. He brought

*For the authorities in this series on the question what is, and is not, an additional use of land by a railroad, entitling the owner of the fee or an abutting owner to additional compensation, see foot-note appended to *McCulloch v. North Carolina R. Co.* (N. Car.), 28 R. R. R. 330, 51 Am. & Eng. R. Cas., N. S., 330, where all those preceding it are collected.

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this action to recover damages to said premises under the provisions of an ordinance of the town of Clarion passed April 7, 1902, granting to the Mason City & Ft. Dodge Railroad Company the right to locate and lay down one or more additional railroad tracks upon Manson street in front of plaintiff's property, one of which additional tracks had already been laid and was being used for a switching track. In 1886 the Mason City & Ft. Dodge Railroad Company built a railroad between Mason City, in Cerro Gordo county, Iowa, and Ft. Dodge, in Webster county, through Clarion, and applied to the town council of Clarion for an ordinance permitting said company to lay its railroad track upon Manson street, in said town, and thereupon the said council passed an ordinance on August 14, 1886, as follows, so far as the same is material here: "Be it ordained * * * that the Mason City & Ft. Dodge R. R. Co. is authorized and permitted to locate and lay down and forever maintain its railroad track upon and along Manson St. in Eastman's Addition of said town of Clarion. The terms and conditions of the above ordinance are that said Mason City & Ft. Dodge Railroad Company shall leave the said street for travel in as good condition as the same now is, and at the intersection of streets shall maintain good and suitable crossings as the same are required, and make adequate compensation to all abutting property owners for the damages sustained." Pursuant to this ordinance, the railroad company laid a single track on Manson street, and thereafter it paid to J. M. Overbaugh, the plaintiff's grantor, \$350 damages on account of the location of said track on Manson street. This was the only track on said street until in 1902, when, at the special instance and request of the said railroad company, the city council of Clarion passed another ordinance granting to the said railroad company the right to lay one or more additional tracks on said street; section 2 of said ordinance providing that the railroad company should make adequate compensation to the abutting property owners for damages sustained by reason of such additional track. The trial court held that the ordinance of 1886 gave the defendant company the right, not only to occupy said street with its main track, but the right to lay thereon such additional tracks as might be necessary for the reasonable and proper conduct of its business, and that the ordinance of 1902, known as "Ordinance No. 51," was of no force or effect.

While it may be true as a general proposition that the right to lay a track would carry with it implied authority to lay such additional tracks as might be reasonably necessary for the transaction of the business of the road, it is not controlling in this case because of the facts and circumstances disclosed by the record. It is a well-established principle that grants of franchise or license are to be strictly construed in favor of the grantor and against the grantee, and that no right will pass by implication unless it is

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of such a character as to be without question. And, in accordance with this principle, it is practically the universal holding that grants by a municipality of the right to use its streets are to be strictly construed against the grantee. 10 Cyc. 1088, and cases there cited; *Fertilizing Co. v. Hyde Park*, 97 U. S. 666, 24 L. Ed. 1036. One of the strongest reasons for the rule as applied to municipal corporations is to be found in the fact that its streets are for the use of the public, and whatever franchises or licenses the municipality may grant to a railroad company cannot ordinarily defeat the primary purpose for which the streets are dedicated, and a grant should not be construed to impose any greater burdens upon the public, or upon owners of property abutting the streets who are injuriously affected by the grants, than are expressly given by the grant, or are so clearly implied therefrom as to leave no question of doubt as to the extent of the grant. Here the record discloses facts and circumstances which leave no doubt as to the purpose for which the original grant was made. The first ordinance gave the railroad company in explicit language the right to lay its track upon and along said street of Manson. The damage to the abutting property was settled on the basis of the damage done by this single track. Thereafter the city, by its authorities, and the railroad company, construed the original grant as giving the company the right only to use the street for a single track, and it is a well-settled rule that the interpretation which the parties themselves by their acts have practically given a contract or a grant will have great weight in determining its terms or extent. *Stewart v. Pierce*, 116 Iowa, 733, 89 N. W. 234. As we have heretofore said, the use of a public street for railway purposes is more or less adverse to the interests of the public and to the interests of abutting property owners, and, where application is made to a municipality for the use of one or more of its streets for the purpose of laying a single track, and the damages to abutting property are paid on the single track, the courts should be very slow to construe an ordinance granting the franchise or license so as to permit the laying of additional tracks. And, where a municipality and the railroad company have themselves given a different interpretation to the act, such interpretation should be held of great weight and practically controlling. Whether or not the railroad company is authorized to occupy the streets for additional tracks without a new grant of authority must depend upon the terms of the original grant, and in this case we are constrained to hold that no such authority existed. The appellees rely upon *Hileman v. C. G. W. Ry. Co.*, 113 Iowa, 591, 85 N. W. 800, to support their contention that the original grant conferred the power to lay additional tracks, but a careful examination of that case clearly shows we think that it is not controlling here. There the plaintiff had executed a release to the company which was broad enough to cover all damages which

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might be suffered in the future by any reasonable use to which the company might put the street. The right to lay additional tracks in a street without express authority therefor in the original grant was denied in the following cases: *Savannah R. Co. v. Woodruff*, 86 Ga. 94, 13 S. E. 156; *Railroad Co. v. Railroad Co.*, 157 Pa. St. 42, 27 Atl. 683; *Jones v. Railroad Co.*, 169 Pa. St. 333, 32 Atl. 535, 47 Am. St. Rep. 916; *Riedinger v. Marquette R. R. Co.*, 62 Mich. 29, 28 N. W. 775; *Evans v. C. R. R. Co.*, 86 Wis. 597, 57 N. W. 354, 39 Am. St. Rep. 908. It is manifest that additional tracks laid in a street will entitle an abutting property owner to additional damages when such additional tracks were not provided for or contemplated at the time of the original assessment of the damages. *R. I. R. Co. v. Johnson*, 204 Ill. 488, 68 N. E. 549. With this view of the controlling question in the case, we need not determine the question raised as to the admissibility of certain letters offered by the appellant.

For the reasons pointed out, the trial court was in error, and the case must be reversed.

Reversed.

STATE v. MINNESOTA & I. RY. CO. (two cases).

(Supreme Court of Minnesota, Jan. 8, 1909.)

[118 N. E. Rep. 1007.]

Taxation—Railroads—Gross Earnings.—Gross receipts from labor and work train service, and materials furnished in maintaining, laying, surfacing, extending, and taking up spur tracks for private parties, is no part of the gross earnings forming the basis of the 3 per cent. tax, under Gen. St. 1894, § 1667.

Application for reargument. Opinion modified.

For former opinion, see 118 N. W. 679.

PER CURIAM. Application for reargument was granted in this case upon the question whether item No. 8, considered under division 2 of the opinion, constituted "gross earnings," within the meaning of the statute. This item consisted of gross receipts from labor and work train service and material furnished in maintaining, laying, surfacing, extending, and taking up spur tracks.

A reconsideration of this item leads us to the conclusion that our former holding was erroneous in including it among the gross earnings. The purpose of constructing and repairing spur tracks for private parties was to secure facilities for the receipt of freight at the cost price. The railway company furnished the material and constructed these spur tracks at cost, and cheaper than could be done by private parties. There was no intention to make any profit out of such transactions, and this class of services is distinguishable from the rental of equipment or work trains.

To this extent the decision heretofore filed is modified.

CHICAGO, M. & ST. P. RY. CO. v. CITY OF JANESVILLE et al.

(Supreme Court of Wisconsin, Nov. 10, 1908.)

[118 N. W. Rep. 183.]

Railroads—Property—Forced Sale.*—The general principle that the franchises of a railroad company, together with its property necessary for railroad purposes, constitute an entirety which is not ordinarily subject to division by sale of a part on judicial or tax process, is subject to the exception that such sale and division may be authorized by special legislative authority, though ordinary general statutes will not be construed as applying to such property.

Municipal Corporations—Local Improvements—Assessment—Railroads.†—Under Laws 1903, p. 688, c. 425, making railroad property assessable for local improvements to the same extent as individual property, lands on which a railway company's freight depot and spur tracks are situated are assessable, though part of the entirety of the company's property.

Municipal Corporations—Assessment—Front Foot Rule—Validity.—General city charter law (St. 1898, §§ 925-216, to 925-218), providing for the assessment of a fixed proportion of the cost of a public sanitary sewer against adjoining lots by the front foot rule, is valid, under the rule that assessments against adjoining property are not limited to benefits received when properly made under the police power.

Appeal from Circuit Court, Rock County; George Grimm, Judge.

Action by the Chicago, Milwaukee & St. Paul Railway Company against the city of Janesville, impleaded with others. From the judgment, both parties appealed. Affirmed on plaintiff's appeal, and reversed, with directions, on defendant's appeal.

Jackson & Jackson (C. H. Van Alstine, of counsel), for plaintiff.

H. L. Maxfield, City Atty., for defendants.

WINSLOW, C. J. The city of Janesville, having adopted those provisions of the general city charter law relating to the building of sewers (sections 925-208 to 925-239, St. 1898), proceeded to construct sanitary sewers in certain streets of the city, and levy assessments against adjoining real estate at the uniform rate of

*See foot-note appended to *Margo v. Pennsylvania R. Co.* (Pa.), 19 R. R. R. 578, 42 Am. & Eng. R. Cas., N. S., 578, where all those preceding it are collected.

†See foot-note appended to *City of Seattle v. Seattle & M. R. Co.* (Wash.), 30 R. R. R. 50, 53 Am. & Eng. R. Cas., N. S., 50; foot-notes appended to *City of Seattle v. Seattle Elec. Co.* (Wash.), 29 R. R. R. 432, 52 Am. & Eng. R. Cas., N. S., 432.

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40 cents per linear foot to pay a part of the expense. The railroad company owns and operates a railroad running through the city upon a right of way 100 feet in width, and also owns several tracts of land adjoining said right of way and fronting on certain of the streets in which sewers were laid. Upon one of these tracts is a freight depot, and upon others are warehouses and other buildings rented by the company to private parties, which are reached by short spur tracks branching off from the main line. The city levied sewer assessments at the uniform rate aforesaid against all of these parcels which fronted on the line of the sewers outside of the 100-foot right of way. The company paid the assessments so made against those parts of such parcels upon which the warehouses were located, but declined to pay the assessments against the freight depot property and the strips seventeen feet wide upon which the spur tracks were located, and brought this action in equity to set aside the last-named assessments on the ground that such property was not subject to assessment. After trial the court sustained the assessments against the freight depot property and against all but two of the strips on which the spur tracks are situated, but set aside the assessments as to the last-named strips because they were found not to be actually benefited, and each party appealed from that part of the judgment adverse to its contention.

The leading contention made by the plaintiff is that the lands on which its freight depot and spur tracks are situated are not subject to assessment for local improvements, because they are a part of an entirety composed of the whole property, real and personal, of a public service corporation, and hence are not severable. The general doctrine that the franchises of such a corporation, together with the property owned by it which is necessary for its use in order to accomplish the purposes of its existence, constitute an entirety which is not ordinarily subject to division by sale of a part on court or tax process, is firmly established in this court. *C. & N. W. Ry. Co. v. Forest County*, 95 Wis. 80, 70 N. W. 77, and cases cited. This principle, however, is subject to the exception that such sale and division may be authorized by special legislative authority. Ordinary statutory provisions, merely general in their nature, will not be construed as intended to apply to such property, but the Legislature has full power over the subject, and may by specific provisions accomplish the result. The general principle is well illustrated in the case of *C. & St. P. Ry. Co. v. Milwaukee*, 89 Wis. 506, 62 N. W. 417, 28 L. R. A. 249, where the city had attempted to assess a strip of the right of way of the company for the paving of an adjoining street. It was contended in that case that the provisions of subdivision 14, § 1038, Rev. St. 1878 (being the same as subdivision 14, § 1038, St. 1898), exempting railway property from general taxation "excepting that the same shall be subject to spe-

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cial assessment for local improvements in cities and villages," made the right of way subject to assessment under the general provisions of the city charter authorizing assessments against adjoining real estate. It was held, however, that the exception in the exemption statute was not an affirmative declaration making railroad property subject to special assessment, but simply confined the exemption to the subject of general taxation, and that the general provisions of the city charter providing for special assessments did not show a legislative intention that a portion of a railroad right of way should be so assessed and severed by sale for nonpayment of the assessment. In the discussion of the question it was said that the principle is established that "such a result cannot be effected under the power of taxation without express legislative authority, and that general language in such statutes will not be held to authorize such a result." Since the decision of that case, however, the Legislature has in no uncertain terms made express provision for the levying of such assessments against such property. Chapter 425, p. 688, Laws 1903, provides, among other things, that the property of railroad corporations "shall be in all respects subject to all special assessments for local improvements in the same manner and to the same extent as the property of individuals." This is an express and unambiguous declaration by the Legislature upon a subject over which it has full power, which closes the question. It is instructive, also, to note that, by the same law, it is provided that such assessments may be collected by ordinary action at law, thus obviating all practical danger of a sale and consequent severance of a part of the corporate property. It must therefore be held that all of the property assessed in the present case was subject to assessment, although it was a part of the entirety.

The second contention of the railroad company is that the assessments are invalid because made for arbitrary sums by the front foot rule, and not in proportion to benefits actually received. The sections of the general charter law under which they were made (sections 925-216 to 925-218, St. 1898) provide for the making of assessments against adjoining lots at an even rate not exceeding \$2 nor less than 25 cents per linear foot on the whole frontage of each lot. There are no provisions for the ascertainment of actual benefits nor for the limitation of the assessments to the amount of actual benefits received. So the contention becomes primarily a contention against the validity of the law, and, if the law be valid, the assessments themselves are valid because they were made in accordance with the terms of the law. This court has held that, where assessments for local improvement are required to be assessed according to the benefits accruing to each parcel, an assessment of a level rate by the front foot rule, while not necessarily void, will be held invalid, unless it appears

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that the assessing board has considered the matter and determined that the benefits are in fact proportionate to the frontage of each parcel. *Hayes v. Douglas County*, 92 Wis. 429, 65 N. W. 482, 31 L. R. A. 213, 53 Am. St. Rep. 926; *Hennessy v. Douglas County*, 99 Wis. 129, 74 N. W. 983; *Sanderson v. Herman*, 108 Wis. 662, 84 N. W. 890, 85 N. W. 141. These cases, however, have no bearing on the question before us because the statute before us does not require the assessment to be in proportion to benefits received. The simple question here is whether a law is constitutional which provides for the assessment of a fixed proportion of the cost of a public sanitary sewer against adjoining lots by the front foot rule.

The decisions upon the general question of the validity of special assessment laws which do not provide for assessments to be made in proportion to the benefits received are very numerous and conflicting. A treatise might easily be written upon the subject, but no attempt will be made to write such a treatise here, as the writer fears that such attempt might result in a collection of words without knowledge which merely darken counsel. It is well settled that assessments against adjoining property are not limited to benefits received where such assessments are properly made under the police power. Thus the court has held that the entire cost of a sidewalk may be properly assessed against the adjoining lot without reference to or ascertainment of actual benefits. *Hennessy v. Douglas County*, 99 Wis. 129, 74 N. W. 983; *Lisbon Avenue L. Co. v. Lake (Wis.)* 113 N. W. 1099. In the last case it was held that, inasmuch as the presence of a defective and dangerous sidewalk constituted a serious public inconvenience and danger, the city might under the police power be clothed with the right to build or repair it at once without notice and to charge the entire expense to the abutting lot upon which it stands, regardless of the question of the amount of benefit actually conferred. A defective sidewalk is a menace to the public safety, and its presence in a public street is quite analogous to the presence of a disease breeding cesspool upon private property, which under well-established principles may be removed by the public authorities and the expense thereof charged to the property if the statute so authorize. The decisions are quite unanimous upon this question, and may be found collated in 2 Cooley on Taxation (3d Ed.) pp. 1128, 1129, 1130. Upon the last-named page Judge Cooley proceeds as follows: "There seems to be no legal impediment to a requirement under the police power that lot owners in cities and villages shall be at the expense of constructing that portion of the public sewer in front of their respective premises"—citing *Van Wagoner v. Paterson*, 67 N. J. Law, 455, 51 Atl. 922. See, also, *Gleason v. Waukesha Co.*, 103 Wis. 225, 79 N. W. 249. There certainly is no fault in this line of reasoning. The preservation of public health from danger re-

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sulting from the accumulation of sewage upon private property in cities is fully as persuasive a justification for the exercise of the police power as the preservation of life and limb from the dangers resulting from defective or snow-covered sidewalks. So far as this court has spoken on the subject, it has sustained the right to make sewerage assessments upon the front foot rule without regard to the extent of benefits. *Meggett v. Eau Claire*, 81 Wis. 326, 51 N. W. 566. See, also, *Blount v. Janesville*, 31 Wis. 648. The provisions of the general charter in question evidently contemplate that all the property drained by the system shall be assessed at an even rate, so that each parcel shall pay approximately its proportionate share of the cost of what may be called merely a service sewer, while the additional expense of main or trunk sewers, made necessary in order to conduct away the combined output of the minor service sewers, shall be borne by the entire district. If this be, as we hold it is, a legitimate exercise of the police power, there are no constitutional objections, either national or state, which stand in the way. See *French v. Barber Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879.

It follows from these considerations that the assessments in question should all have been sustained.

Those parts of the judgment from which the plaintiff appeals are affirmed, and those parts from which the city appeals are reversed, with directions to enter judgment in accordance with this opinion, the city to recover one bill of costs in this court.

STOUT v. BALTIMORE & O. R. Co.

(Supreme Court of Appeals of West Virginia, Dec. 15, 1908.)

[63 S. E. Rep. 317.]

Justices of the Peace—Judgment—Variance.—A judgment of a justice against "B. & O. R. R. Company," as described in the summons, instead of "Baltimore & Ohio Railroad Company," the corporation intended, is not such a material variance as to deprive the justice of jurisdiction of the person of the corporation intended to be sued, or vitiate the judgment against it.

Justices of the Peace—Execution—Variance from Judgment.—Describing the defendant as "B. & O. Rail Road Company" in an execution issued by the justice on such judgment is not such a material variance between the judgment and the execution as to render the execution void; such process being amendable on motion before the justice so as to make it conform to the judgment.

Railroads—Process—Return—Sufficiency—Railroad Corporation.*—For the purpose of serving process in suits against it in this state, a railroad corporation doing business here, though chartered by another state or territory, will be treated as a domestic corporation, and the return of the officer need not show that the place of service was the place of residence of the person served.

(Syllabus by the Court.)

Error to Circuit Court of Harrison County.

Action in a justice's court by Daniel Stout against the Baltimore & Ohio Railroad Company. From a judgment of the Circuit Court, reversing the judgment of the justice overruling a motion to quash an execution, plaintiff brings error. Reversed and entered.

W. Scott, for plaintiff in error.*John Bassel* and *Davis & Davis*, for defendant in error.

MILLER, J. The plaintiff complains of a judgment of the circuit court, pronounced January 31, 1907, upon appeal, reversing the judgment of a justice in his favor, upon motion of the defendant to quash an execution, and adjudging that said execution be quashed. The summons of the justice issued October 19, 1906, summoned the "B. & O. R. R. Company" to answer the complaint of the plaintiff in a civil action, and demanded judgment for \$101.50. The return of the officer on the summons was: "Served

*For the authorities in this series on the questions as to where actions against railroads may be brought, and upon whom in such actions summons may be served, see foot-note appended to *North Wisconsin Cattle Co. v. Oregon, etc., Co.* (Minn.), 30 R. R. R. 55, 53 Am. & Eng. R. Cas., N. S., 55; *Gerary v. Atlantic Coast Line R. Co.* (S. Car.), 29 R. R. R. 384, 52 Am. & Eng. R. Cas., N. S., 384.

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the within writ this 19 day of October, 1906, by delivering a copy thereof to Emory Brand, Agt. for the B. & O. R. R. Company at Bryan Station, Harrison County, W. Va." The judgment rendered by the justice October 27, 1907, was that the "plaintiff Daniel Stout recover from the B. & O. R. R. Co. defendant the sum of \$101.50," with interest and costs; but the execution thereon issued November 19, 1906, not conforming strictly to the judgment, ran against the "B. & O. Rail Road Company." On the return day of the summons, the defendant, appearing specially and solely for that purpose, moved the justice to quash said summons and return for reasons apparent on the face thereof, which motion being overruled, and the defendant not further appearing, the plaintiff proving his case, judgment in the form aforesaid was pronounced. Although attention was called thereto by the special appearance of the defendant, no attempt was made to correct the defects in the summons and the return thereon. This might have been done by simple motion. *Hopkins v. Railroad Co.*, 42 W. Va. 535, 26 S. E. 187. After the execution issued, the defendant gave the plaintiff notice of a motion to be made before the justice December 3, 1906, to quash the same, on the grounds, first, that the summons upon which judgment was rendered is defective and void, the defendant being designated therein by the initials of its name and not by its name; and, second, that the return of said summons is fatally defective and void.

With respect to the first ground, the general rule is that the writ and declaration should set forth accurately the names of both parties. *Stephen on Pl.*; *Hart v. B. & O. R. Co.*, 6 W. Va. 346; *Krell Piano Co. v. Kent*, 39 W. Va. 296, 297, 19 S. E. 409. It is conceded, however, that misnomer of plaintiff or defendant may be corrected by mere motion of either party, either in the justice's court or upon appeal in the circuit court. *Hoffman v. Dickinson*, 31 W. Va. 145, 6 S. E. 53; *Bank v. Distilling Co.*, 41 W. Va. 530, 23 S. W. 792, 56 Am. St. Rep. 878; *Weimer v. Rector*, 43 W. Va. 735, 28 S. E. 716; section 2120, c. 50, Code 1906. And by section 1979, c. 50, Code 1906, it is provided that, "in any case in which a defendant shall be proceeded against by any other than his true name, it shall be the duty of the justice, when his true name is ascertained, to amend the summons by inserting the same therein, and thereafter to proceed against him by his true name." But was the effect of the failure to rightly name the defendant in summons or judgment, or to correct the misnomer, to render the judgment void or voidable? "It is a well-established rule," says Mr. Black, "that if process in action is served upon the person really intended to be sued, although a wrong name is given him in the writ and return, and he suffers a default, or, after appearing, omits to plead the misnomer in abatement, and judgment is taken against him, he is concluded thereby, and in all future litigation he may be connected with

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the suit or judgment by proper averments." And again he says: "Process served on a man by a wrong name is as really served on him as if it had been served on him by his right name, and if in such case he fails to appear, or, appearing, fails to object that he is sued by the wrong name, and the judgment be rendered against him by such name, he is as much bound by the judgment as if it had been rendered against him by his right name." And in the same section he says: "Exactly the same rule applies in the case of a corporation. Though sued by the wrong name, it is bound, if duly served. * * * But it is essential to the plaintiff's recovery that it should be proved, not only that the real person was sued, but that he was duly served with process though under a mistaken name." 1 Black on Judgments, § 213; Freeman on Judgments (2d Ed.) § 154. This doctrine is not in conflict with *Mason v. Bank*, 12 Leigh (Va.) 84, *Bank v. Craig*, 6 Leigh (Va.) 399, and *Stewart & Palmer v. Thornton*, 75 Va. 215, for in each of those cases the wrong persons were intended to be sued, and not the right persons by the wrong names. To say "that, the defendant having been sued and served with process by a wrong name, the court acquired no jurisdiction of him, and could render no valid judgment against him, * * * gives the name quite too much importance. * * * A name is a means of identity. * * * It is not the name that is sued, but the person to whom it is applied." 1 Black on Judgments, § 213, *supra*. In *Bank v. Huntington Distilling Co.*, *supra*, the word "Distillery," instead of the word "Distilling," was employed in the name of the defendant. The court said: "Although a corporation be immaterial and intangible in its essential part, it is a mistake to suppose that the exact letters or syllables of the name, or the name as a whole, are the only means of identification. * * * If some words are added to or omitted in the true name of the corporation, this is not a fatal variance, if there be enough to distinguish the corporation from all others, and to show that the corporation suing or being sued was intended." In *Grafton Grocery Co. v. Home Brewing Company of Grafton*, 60 W. Va. 281, 54 S. E. 349, the words "of Grafton" were omitted. Held to be an immaterial variance. And the weight of authority is that, so far as execution thereon or subsequent litigation respecting a judgment thus obtained is concerned, it makes no difference whether the same was obtained after appearances without plea in abatement or by default. *First National Bank v. Jagers*, 31 Md. 38, 100 Am. Dec. 54, and cases cited.

We are of opinion, therefore, from these authorities, that styling the defendant in the summons and judgment by the initial letters of its corporate name as in this case was sufficient to show the corporation intended to be sued, and, the proper person being served with process, not such a material variance as to deprive

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the court of jurisdiction of the person of defendant, or vitiate the judgment.

Formerly the variance would have supported a plea in abatement; but since by section 1979, c. 50, Code 1906, relating to proceedings before justices, and section 3834, c. 125, Code 1906, applicable by analogy to such proceedings, no plea for misnomer can be received, but the same may be corrected on mere motion of the parties, or of his own motion by the justice. The variance in this case is still subject to amendment by appropriate proceedings for that purpose, if the court had acquired jurisdiction by proper process served on the person of the defendant. *Casper v. Klippen*, 61 Minn. 353, 63 N. W. 737, 52 Am. St. Rep. 604-606, and cases cited.

One point made, and not yet considered, is that the execution running against "B. & O. Rail Road Co.," and not according to the name of the defendant in the judgment, is such a variance as to render the execution void. In *Dewey v. Peeler*, 161 Mass. 135, 36 N. E. 800, 42 Am. St. Rep. 399, it was held that an execution, if seen to contain a mere clerical error, might be amended to conform to the judgment, if the record thereof is presented in the same court, or treated as amended if presented in some other court. And in this same case it is said: "There can be no doubt of the general power of a court to amend its record or its process, so as to make them conform to the truth." It remains to determine whether the return of the officer is so defective and void as to give the justice no jurisdiction to render the judgment. There can be no doubt that prior to the amendment of 1903 of section 34, c. 50, Code 1899, now section 1985, Code 1906, and by virtue of the provisions of section 38 of the same chapter, now section 1989, Code 1906, the return of service of process on a domestic corporation which failed to show that the place of service was the place of residence of the person served would have been absolutely void, and the justice without jurisdiction to render any judgment. We so held in *Railway Co. v. Ryan*, 31 W. Va. 364-366, 6 S. E. 924, 13 Am. St. Rep. 865, and *Taylor v. Railroad Co.*, 35 W. Va. 328, 13 S. E. 1009. See, also, *Adkins v. Globe Fire Ins. Co.*, 45 W. Va. 384, 388, 32 S. E. 194, and *Railway Co. v. Wright*, 50 W. Va. 653, 654, 41 S. E. 147. Said section 1989 provides that: "Service on any person under either of the last four sections shall be in the county in which he resides, and the return must show this, and state on whom and when the service was, otherwise the service shall not be valid." But by chapter 9, p. 79, Acts 1903, the Legislature introduced a very important amendment into said section 34. This is the section relating to service of process from justice's courts against corporations. Before the amendment, that section prescribed three classes of persons upon whom service might be in the order named therein: (1) "Upon the president, cashier,

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treasurer or chief officer thereof," or if no such officer, or he be absent; (2) "on any officer, director, trustee or agent * * * at its principal place of business"; or (3) on a like class of officers "in any county in which a director or other officer, or any agent of said corporation may reside." The amendment then follows in these words: "Or any officer or agent of said corporation in the county in which the property, land or other thing in controversy may be, or in any county where the cause of action arises." The scope and effect of this amendment was under consideration in *Speidel Co. v. Warder*, 56 W. Va. 602, 49 S. E. 534, and, though it was probably not necessary to a decision of that case, it was laid down in the first point of the syllabus that "a justice has jurisdiction of an action for money against a domestic corporation either in the county of its principal office, or in the county where the cause of action arose, if service of process can be made in that county on a director or other officer or agent of the corporation whether the person so served resides therein or not, and the return of service need not show that he resides therein." No direct reference is made in the opinion in that case to section 38, which in terms at least, as it was left in the Code of 1899, is applicable to section 34; but to give the effect to the amendment which the Legislature evidently intended we can give it no other construction than the one announced in *Speidel Co. v. Warder*, *supra*. This construction may not necessarily work a repeal of section 38. It may perhaps still be applied with its full force to the other provisions of section 34; but this question is not presented, and we do not decide it. But, suppose it cannot be thus construed, the amendment of 1903, being the latest expression of the Legislature, must prevail over any other statute plainly in conflict with it. We are strengthened in our view of this amendment, because at the same session of the Legislature, section 2, c. 124, Code 1899 (section 3798, Code 1906), relating to how process generally may be directed, and which, before the amendment, did not permit process to be directed to an officer of any other county than that in which suit is brought, except in cases where the "defendant be a railroad, canal, turnpike, telegraph or insurance company," was so amended as to include in said exception, "any other corporation, notwithstanding the second division of section one of chapter one hundred and twenty-three of the Code." That provision permits an action at law or suit in equity to be brought in the circuit court of any county "if a corporation be a defendant wherein its principal office is, or if its principal office be not in this state, and its mayor, president, or other chief officer do not reside therein, wherein it does business." There is in these amendments evinced a purpose on the part of the Legislature, with respect to suits and proceedings before justices and in the circuit court, to enlarge their jurisdiction over, and extend the remedies against all kinds and classes of corporations.

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But *Speidel Co. v. Warder* interprets only section 34, relating to domestic corporations, for point 1 of the syllabus is limited to domestic corporations. We still have section 35, of the same chapter, covered, in terms, by said section 38, and providing that, "if the suit be against a foreign corporation doing business by an agent in this state, service may be made by delivering a copy of the process, order, or notice to such agent, or leaving such copy at the office or place of business of such corporation with any person found at the time in charge thereof." But what is the status of the defendant company with reference to suits or actions brought against it in this state? Section 30, c. 54, Code 1899 (section 2322, Code 1906), says: "Every railroad corporation doing business in this State under the provisions of this section, or under charters granted or laws passed by the State of Virginia or this State, is hereby declared to be, as to its works, property, operations, transactions and business in this State, a domestic corporation, and shall be so held and treated in all suits and legal proceedings which may be commenced or carried on by or against any such railroad corporation, as well as in all matters relating to such corporation." The distinction between "citizenship" and "residence," as applied to this company, in suits and proceedings against it in this state, is fully covered in *Baltimore & Ohio Railroad Company v. Allen*, 58 W. Va. 388, 52 S. E. 465, 3 L. R. A. (N. S.) 608, 112 Am. St. Rep. 975; *Floyd v. National Loan & Investment Co.*, 49 W. Va. 327, 38 S. E. 653, 54 L. R. A. 536, 87 Am. St. Rep. 805. In that case the opinion is expressed that, in view of this statute, the status of a railroad company doing business in this state is equivalent to that of a resident of the state.

This being so, said section 35 is inapplicable, and we can perceive of no reason why process may not be executed on a railroad corporation doing business here, though chartered by another state, in the same manner, and on the same persons, as in suits against other domestic corporations. Our conclusion is that it may be, and that the return of the officer in this case was, sufficient to give the justice jurisdiction to render a personal judgment against defendant, although it did not appear therefrom that the place of service was the place of residence of the person served.

We are therefore of opinion to reverse the judgment below, and enter here the judgment which the lower court should have entered on the motion of the defendant to quash the execution.

PEABODY *v.* HAVERHILL, G. & D. ST. RY. CO. (two cases).

(Supreme Judicial Court of Massachusetts, Essex, Nov. 25, 1908.)

[85 N. E. Rep. 1051.]

Street Railroads—Actions for Injuries—Evidence.—Evidence in an action against a street railroad company for injuries received while attempting to cross the track in a vehicle driven by another person considered, and held sufficient to warrant the jury in finding that plaintiff was in the exercise of proper care.

Street Railroads—Actions for Injuries—Evidence.*—Evidence in an action against a street railroad company for injuries received while attempting to cross the railroad track in a vehicle driven by another person considered, and held to warrant the jury in finding that the driver was not under plaintiff's control, and that his negligence could not be imputed to her.

Negligence—Contributory Negligence—Imputed Negligence.—If a father is driving with his young child, or if a child is driving with his parent while under the general control or special supervision of the parent, the negligence of the one who is driving, in driving upon a street railroad track, would be imputed to the other; but, unless there is a voluntary, unconstrained surrender of all care to the caution of the driver, the question of the liability of the parent for the negligent acts of the child in driving across a railroad track is one of fact.

Street Railroads—Injuries to Persons on Track—Actions—Sufficiency of Evidence.—Evidence in an action against a street railway company for injuries received while attempting to cross defendant's track considered, and held to justify a finding that the collision was due to the negligence of defendant's motorman.

Report from Superior Court, Essex County; Charles U. Bell, Judge.

Actions by Sarah A. Peabody and by Daniel Peabody against the Haverhill, Georgetown & Danvers Street Railway Company. Verdict for plaintiff in each case. Report from superior court. Judgments ordered on the verdicts.

*For the authorities in this series on the question whether the negligence of those controlling the movements of vehicles is imputable to others riding with them, see first foot-note appended to *Wade v. Western Maryland R. Co.* (Pa.), 3 R. R. R. 238, 53 Am. & Eng. R. Cas., N. S., 238; second foot-note appended to *Davis v. Chicago, etc., Ry. Co.* (C. C. A.), 30 R. R. R. 183, 53 Am. & Eng. R. Cas., N. S., 183; second foot-note appended to *Paducah Traction Co. v. Sine* (Ky.), 30 R. R. R. 755, 53 Am. & Eng. R. Cas., N. S., 755.

See foot-notes appended to *Richmond, etc., R. Co. v. Martin's Adm'r* (Va.), 13 R. R. R. 435, 36 Am. & Eng. R. Cas., N. S., 435; last foot-note appended to *Mattson v. Minnesota & N. W. R. Co.* (Minn.), 16 R. R. R. 502, 39 Am. & Eng. R. Cas., N. S., 502.

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Coakley, Coakley & Sherman and *W. J. McDonald*, for plaintiffs.

J. P. Swerney and *L. S. Cox*, for defendant.

SHELDON, J. We cannot say that there was not some evidence for the jury to consider on the question of the due care of the female plaintiff. She was being driven by her son, a young man of about 20 years, in his buggy drawn by his horse. As in *Chadbourn v. Springfield St. Ry.*, 85 N. E. 737, she seems to have conducted herself as his invited guest, and due care on her part may have required that she should not attempt to do otherwise, or in any way to control or interfere with his mode of driving and management of the team. She had no reason to anticipate negligence on his part, and there was evidence that at a suitable place she leaned forward and looked in the direction from which a car would come. She was insane at the time of the trial, and did not testify. But from all the circumstances the jury might have inferred that she looked for an approaching car and saw none. They might say that her failure to see or hear the car did not show negligence on her part, because of the obstructions to the view from the driveway and of the noise of the brook which ran across the street, and because, as might be found, no bell was rung or other signal given from the car itself. See *Beale v. Old Colony St. Ry.*, 196 Mass. 119, 81 N. E. 867; *Fitzhugh v. Boston & Maine R. R.*, 195 Mass. 202, 80 N. E. 792; *Evensen v. Lexington & Boston St. Ry.*, 187 Mass. 77, 72 N. E. 355. It was not the regular time for a car to pass; and this fact was not without some significance, although cars were occasionally late. In view of all these circumstances, although the question is close and the evidence was undoubtedly meager, the jury had a right to find that she was herself in the exercise of proper care.

There was undoubtedly evidence that her son who was driving the buggy was guilty of negligence which contributed to the accident, and the defendant's counsel contend that this negligence should be imputed to her, both because they were engaged in a common enterprise, and because of the relation of parent and minor child which existed between them. But we are of opinion that the jury had a right to say that she stood in the position of a mere guest of her son, that she exercised no control over his actions in driving the carriage, and that she ought not to be held responsible for his negligence.

There was evidence that she went at his invitation to visit a friend of his in Haverhill. The fact that after the start from her house she found that she had left her glasses behind and that her son drove back to get them for her, did not necessarily make him her agent or servant; he may have done it simply as a kindly act and not in obedience to an order from her. The jury could

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find that her position was and continued to be that of an invited guest. Of course in that event they were not in any sense engaged in a common enterprise.

Nor is the mere relation of parent and child decisive upon this question. Undoubtedly, if a father is driving his young child, or if a child is driving his parent while under the general control or the special supervision of the latter, the negligence of the one who was driving would be imputed to the other. And undoubtedly the relationship of parent and child would make it easier to infer the existence of supervision and control than if the question arose between mere strangers; and this is especially so if the child is a minor. But ordinarily and in the absence of special circumstances the question is one of fact, and the test is whether the relation of principal and agent or master and servant existed at the time, where there has not been, as the jury have found that there was not here, an exclusive dependence upon the care of the driver, that is, "a voluntary, unconstrained, non-contractual surrender of all care" to the caution of the driver. *Shultz v. Old Colony St. Ry.*, 193 Mass. 309, 323, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502. This has been the rule applied in principle in our latter cases. *Feneff v. Boston & Maine R. R.*, 196 Mass. 575, 82 N. E. 705; *Miller v. Boston & Northern St. Ry.*, 197 Mass. 535, 83 N. E. 990; *Chadbourn v. Springfield St. Ry.*, 85 N. E. 737. It is the rule which has been approval in other jurisdictions. *Weldon v. Third Avenue R. R.*, 3 App. Div. 370, 38 N. Y. Supp. 206; *Boone County Commissioners v. Mutchler*, 137 Ind. 140, 149, 36 N. E. 534; *Buckler v. Newman*, 116 Ill. App. 546.

There was evidence to justify a finding that the collision was due to the negligence of the defendant's motorman in running his car to and over the plaintiff's driveway at an excessive rate of speed, without any warning signals, at a time when in the regular course of things it was not to be expected. He himself testified that he saw the plaintiff's carriage when his car was at a point which by measurement was more than 100 feet from the place of the accident, that he could stop his car in a distance of from 90 to 100 feet; that although he applied his brakes at first, he then let them off and put on his power and tried to get by the end of the driveway before the horse should reach the car tracks. He gave other testimony, and there was other evidence in the case which would amply have justified a finding for the defendant; but the whole question was for the jury.

Accordingly, in each case judgment must be entered on the verdict; and it is

So ordered.

KERN v. DES MOINES CITY RY. CO.

(Supreme Court of Iowa, Nov. 24, 1908.)

[118 N. W. Rep. 451.]

Appeal and Error—Review—Direction of Verdict for Defendant—Consideration of Testimony.—The court, on reviewing a directed verdict for defendant at the close of plaintiff's case, must view the case most favorable to plaintiff, and all legitimate inferences which the testimony will bear must be resolved in his favor.

Trial—Direction of Verdict—When Authorized.—Where on the whole case reasonable minds may differ as to the weight of the testimony or the inferences to be drawn therefrom, the conclusions are for the jury.

Street Railroads—Collisions—Negligence—Question for Jury.*—In an action for death in a street car collision, the fact that the car was operated at an unlawful rate of speed is sufficient to take the case to the jury on the issue of negligence.

Evidence—Opinion Evidence—Speed of Cars.—A person who is not an expert, but who shows some qualifications to speak on the subject, may testify as to the speed of street cars.

Evidence—Res Gestæ—Declarations—Admissibility.†—In an action for death in a street car collision, declarations of the motorman, made immediately after the accident, are a part of the *res gestæ*.

Appeal and Error—Erroneous Rulings—Presumption of Prejudice.—An erroneous ruling is presumptively prejudicial, and ordinarily the successful party must show that it was without prejudice.

Street Railroads—Collisions—Evidence—Admissibility.—Where, in an action for death in a street car collision, the injuries and death of decedent were admitted, but there was doubt as to how and where he was struck, and as to his position when struck, the evidence of a physician giving the nature and a description of the wounds was admissible to aid in solving such questions.

*For the authorities in this series on the question whether the speed of a car or train is negligent because in violation of an ordinance, see first foot-note appended to *Butler v. Rhode Island Co.* (R. I.), 28 R. R. R. 322, 51 Am. & Eng. R. Cas., N. S., 322; foot-note appended to *Ashley v. Kanawha Valley Traction Co.* (W. Va.), 26 R. R. R. 520, 49 Am. & Eng. R. Cas., N. S., 520.

†See first foot-note appended to *Conklon v. Consolidated Ry. Co.* (Mass.), 29 R. R. R. 573, 52 Am. & Eng. R. Cas., N. S., 573; second foot-note appended to *Illinois Cent. R. Co. v. Cotter* (Ky.), 27 R. R. R. 141, 50 Am. & Eng. R. Cas., N. S., 141; foot-note appended to *Stroud v. Columbia, etc., R. Co.* (S. Car.), 27 R. R. R. 28, 50 Am. & Eng. R. Cas., N. S., 28; second foot-note appended to *Union Pac. R. Co. v. Edmondson* (Neb.), 26 R. R. R. 173, 49 Am. & Eng. R. Cas., N. S., 173; second foot-note appended to *Frye v. St. Louis, etc., R. Co.* (Mo.), 26 R. R. R. 75, 49 Am. & Eng. R. Cas., N. S., 75.

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Evidence—Res Gestæ—Declarations.—Where, in an action for death in a street car collision, the issues involved defendant's liability under the last clear chance and decedent's contributory negligence, the exclusion of declarations of the motorman, made immediately after the accident, was erroneous, for they might show defendant's liability on the last clear chance, and negative decedent's negligence.

Street Railroads—Collisions—Care of Pedestrian.‡—A pedestrian crossing a street car track in front of an approaching car is justified in believing that the car will not come at a greater rate of speed than the maximum fixed by the municipal ordinance.

Street Railroads—Collisions—Contributory Negligence.—A street railway company cannot, by its own failure to comply with its rules and customs made for the benefit of the public, place one who is rightfully on a street in a hazardous position, and then claim that in extricating himself he did not act with the prudence which one would use under ordinary circumstances.

Street Railroads—Collisions—Contributory Negligence—Question for Jury.§—A pedestrian, seeing an approaching car 375 feet away, is not, as a matter of law, bound to look a second time, a few moments thereafter, for he may assume, after having located the car, that it would not be rushed down upon him at an unusual rate of speed.

Street Railroads—Collisions—Contributory Negligence—Question for Jury.—Whether a pedestrian struck by a street car was guilty of contributory negligence held, under the evidence, for the jury.

Negligence—Contributory Negligence—Question for Jury.—Where one places another in a position of peril, it is for the jury to determine whether or not the latter acted in the manner one placed in a dangerous position is likely to adopt.

Street Railroads—Collisions—Negligence—Contributory Negligence.||—Where a street railway company by its own negligence throws a pedestrian off his guard or puts him in peril, the conduct of the pedestrian will not be regarded as contributory negligence under any circumstances.

‡See first foot-note appended to *Powers v. Des Moines City Ry. Co.* (Iowa), 29 R. R. R. 709, 52 Am. & Eng. R. Cas., N. S., 709; first foot-note appended to *Schwanefeldt v. Chicago, etc., Ry. Co.* (Neb.), 29 R. R. R. 238, 52 Am. & Eng. R. Cas., N. S., 238; *Kuntz v. Oregon R. Co.* (Ore.), 29 R. R. R. 721, 52 Am. & Eng. R. Cas., N. S., 721; foot-note appended to *Southern Ry. Co. v. Stockdon* (Va.), 26 R. R. R. 63, 49 Am. & Eng. R. Cas., N. S., 63.

§For the authorities in this series on the subject of the duty of a highway traveler to look again for trains or cars just before he attempts to cross railroad tracks, see foot-note appended to *Cherry v. Louisiana & A. Ry. Co.* (La.), 30 R. R. R. 746, 53 Am. & Eng. R. Cas., N. S., 746.

||See first foot-note appended to *Davis v. Chicago, etc., Ry. Co.* (C. A.), 30 R. R. R. 183, 53 Am. & Eng. R. Cas., N. S., 183; foot-note appended to *McFeat v. Philadelphia, etc., R. Co.* (Del.), 30 R. R. R. 254, 53 Am. & Eng. R. Cas., N. S., 254; last foot-note appended to *Smith's Adm'r v. Norfolk & W. Ry. Co.* (Va.), 29 R. R. R. 715, 52 Am. & Eng. R. Cas., N. S., 715.

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Appeal from District Court, Polk County; Jesse A. Miller, Judge.

Action at law to recover damages for the death of V. D. Kern, due, as is alleged, to defendant's negligence in operating its street cars on one of the streets in the city of Des Moines. At the conclusion of plaintiff's evidence the trial court on motion directed a verdict for the defendant, and plaintiff appeals. Reversed.

Gillispie & Bannister and Thos. A. Cheshire, for appellant.
N. T. Guernsey and Parker, Hewitt & Wright, for appellee.

DEEMER, J. As there was a directed verdict for defendant at the close of plaintiff's testimony, we must take that view of the case most favorable to plaintiff which the evidence tends to disclose, without, of course, indicating that this is the one which should obtain upon a trial by jury. All reasonable and legitimate inferences which the testimony will bear must be resolved in favor of the plaintiff; and, if on the whole case reasonable minds differ regarding the weight of the testimony or the inferences to be drawn therefrom, the conclusions are for a jury, unless, giving to the testimony its most favorable aspect, no other conclusion may fairly be drawn save the one arrived at by the trial court. We may say at the outset that we are favored with a copy of the opinion of the trial court, announced when passing on the motion to direct, from which it appears that the motion was sustained on the ground that plaintiff's intestate had not shown himself free from contributory negligence. This much for the reason that with this thought in mind the case may be better understood as we proceed.

V. D. Kern was an insurance agent, living at 1334 East Walnut street in the city of Des Moines. He was at the time of his death 32 years of age, and had a wife and children dependent upon him. He had been troubled with rheumatism, but it is claimed had recovered before the accident in question. Grand avenue in the city of Des Moines is one of the principal streets in that city, running from its western limits eastward past the State Capitol to the State Fair Grounds. For a part of the way on the east side of the Des Moines river the defendant, an electric street railway company, occupied this street with its tracks—the tracks being double from Twelfth to Fourteenth streets on that side of the river. At the crossing of Grand avenue with East Thirteenth street the rails of these tracks were 4 feet and 8 inches apart, and the south rail of the north track is 4 feet and 4 inches distant from the north rail of the south track. It was Kern's custom to take defendant's street car in going to and returning from his home, and he almost universally took the car

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at the junction of Thirteenth street with Grand avenue. It was the habit and custom of the street car company to stop its cars for the ingress and egress of passengers at the far side of the crossing; that is to say, it passed over the street intersections with its cars before stopping to receive or discharge passengers. There is an ordinance of the city forbidding a greater speed of street cars than 8 miles per hour in the business district and than 12 miles per hour in the residential section. The junction of Thirteenth street and Grand avenue and all other places in the immediate vicinity are in residential sections. The annual state fair was in progress on the grounds of the society at the east end of Grand avenue during the last week in August of the year 1906, and the street cars were generally heavily loaded, and ran at frequent intervals over the tracks of the defendant company on East Grand avenue. The cars and trains ran both east and west over and upon the double tracks above described, the west-bound cars taking the north and the east-bound the south tracks. East Walnut where Kern lived is south of Grand avenue, and to take the west-bound cars he went north on Thirteenth to Grand, crossed over the south track to the north one, and to take the car was obliged to go to the northwest corner of the street intersection where the cars were stopped. East Twelfth street is approximately 375 feet west of East Thirteenth, and East Fourteenth is about 700 feet east of East Thirteenth. The grade is downward from Twelfth to Thirteenth, and from some distance eastward, from Twelfth to Thirteenth being 1.22 per cent. At or about 2 o'clock in the afternoon Kern started from his home with the declared purpose of visiting his father, who lived on the west side of the river. He went from his home north on the east side of Thirteenth street, came to Grand avenue, and there it is claimed saw one of defendant's trains slowly coming from the east, made up of the usual car and a trailer, which was close to the intersection of Grand avenue with Thirteenth street. At the time that Kern reached the southeast corner of the intersection of these streets there was an east-bound car at the junction of Twelfth street with Grand, 375 feet to the westward from Grand and Thirteenth. A west-bound car had passed just before Kern came to Grand avenue, and it is evident from the entire record that Kern was intending to take the west-bound train, which was then nearing the street intersection when he reached the junction of Thirteenth and Grand. He had started from home with the intention of going to the west side of the city, had gone to the place where he usually took the street cars, and was observed passing from the junction of Thirteenth and Grand at the southeast corner, northward and a little west toward the northwest corner of these street intersections. As he approached the tracks, the west-bound train, instead of passing over the street

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intersection and stopping at the far side thereof, stopped in the middle of the street intersection for some purpose, and Kern was prevented from getting across to the north side of the north track to take the car, which he was evidently intending to board. Just here we find the most serious dispute in the case. On the one hand, it is contended that there is no proof that Kern intended to take the west-bound car, and no testimony that he saw this car, which was now very close to the street intersection. It is also contended, on the behalf of the railway company, that the west-bound car was stopped because Kern was either upon the track or close to it and to avoid striking him. We have set forth enough of the record to show that a jury was justified in finding that Kern was intending to take this train, and had started across Grand avenue for that purpose. Whether or not he saw the west-bound train which he was intending to take as he came to the street intersection was a question for a jury, under all the circumstances disclosed, which in part consisted of some testimony that deceased looked in the direction of that train as he left the curb to cross the street.

There was also testimony from which a jury might have found that the west-bound train was stopped at an unusual place because it had carried by some passengers who wished to alight at Fourteenth street east, and desired to have them get off as soon as possible. As these were jury questions, we must assume, for the purposes of this appeal, that they would have been resolved in favor of plaintiff. We have, then, this west-bound car stopping before crossing the street intersection of Thirteenth street, and directly in front of deceased as he was pursuing his way toward the northwest corner of the street intersection. Before stopping, the bell was rung for the crossing, and considerable noise attended the act of slowing down. A jury was authorized to find that, immediately upon the stopping of the west-bound train in the path which deceased was pursuing, he started eastward to go around the latter, and that while passing along the side of the trailer, he was struck by the east-bound car which he had seen at Twelfth street as he had started to cross Grand avenue to take the west-bound train. This east-bound car was running at a speed of from 15 to 25 miles an hour, and a jury may have found that it was running at even a greater rate than the highest here named, and that no bell or gong was sounded until just as the car reached and run over plaintiff's intestate. The car was going so fast that it ran from 125 to 150 feet after it struck Kern before it was brought to a stop. There is no direct testimony that the motorman on the east-bound car saw deceased until just as it struck him; but, as no signal was given until immediately before the collision, a jury may have concluded that he did not see Kern until just as the car was about to strike him. When Kern was struck, or just immediately before that time,

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the west-bound train was standing, discharging passengers; but the motorman on the east-bound car paid no attention, contrary to the custom of motormen, to the fact that he was approaching a standing train from which passengers were being discharged, and did not slow down or place his car under control as he came to the standing car. All agree that Kern was struck by the rapidly moving east-bound car, and that he was run over, receiving injuries from which he died on August 31, 1906.

Little or nothing is said regarding the sufficiency of the testimony to justify a finding of negligence on the part of the defendant's employees in the operation of the two cars or trains of which we have been speaking. It is practically conceded that there is enough testimony to support many of the specifications of negligence; and, if there were nothing more in the case than the unlawful speed of the east-bound car, this would be sufficient to take the case to a jury on the issue of defendant's negligence. Passing that point, we have the question of plaintiff's contributory negligence, or rather his freedom from such negligence, and certain rulings made by the trial court on the rejection of testimony. Before going to the main issue on which the case was determined by the trial court we shall dispose of some of the rulings on testimony. Certain witnesses, nonexpert it is true, but who showed some qualifications to speak upon the subject, were asked to state how fast the east-bound car was going. On defendant's objection this testimony was excluded. It should have been received. *Van Horn v. Railroad*, 59 Iowa, 33, 12 N. W. 752; *Pence v. Railroad*, 79 Iowa, 389, 44 N. W. 686; *Cronk v. Railroad*, 123 Iowa, 349, 98 N. W. 884; *Gregory v. R. R. Co.*, 126 Iowa, 232, 101 N.W. 761.

A witness named Jackley, who was riding on the east-bound car, alighted as soon as it was stopped after it had struck Kern, went to where Kern was lying, there met the motorman of the east-bound car, and immediately had a conversation with him as to how the accident occurred. Questions calling for statements of the motorman in this connection were objected to, and the objections were sustained. They should have been overruled. These declarations were clearly part of the *res gestæ*, and they should have been admitted as a part of the transaction. *Alsever v. Railroad*, 115 Iowa, 338, 88 N. W. 841, 56 L. R. A. 748; *Fish v. Railroad*, 96 Iowa, 702, 65 N. W. 995; *Christopherson v. Railroad*, 135 Iowa, 409, 109 N. W. 1077; *Hynoven v. Iron Co.*, 103 Minn. 331, 115 N. W. 167. The only argument made in support of the ruling is that, although erroneous, it was without prejudice, because there is nothing showing what plaintiff expected to prove by the witness. This proposition, while ingenious, is without merit. The testimony was, as we have said, a part of the transaction, and a material part thereof. Plaintiff was entitled to show it all, and was not bound to disclose her purpose in so

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doing. Being a part of the transaction itself, it was manifestly material, and its rejection was presumptively prejudicial. It was not a collateral matter, the materiality and competency of which did not appear, but a part of the "thing done," to which plaintiff was entitled. An erroneous ruling under our practice is presumed to be prejudicial, and ordinarily it is for the successful party to show that it was without prejudice. A doctor, who examined Kern and treated him after he was hurt, was asked to describe the nature of his wounds in ordinary language so that a jury could understand it. Objection to this was sustained on the ground that, as the injury and death were admitted by defendant, there was no necessity for going into this matter. There was some doubt about just how and where Kern was struck, and some question as to his exact position when struck. An examination of his wounds and a description thereof would certainly help to solve these problems, and the question should have been answered. There was no testimony in the case, either expert or nonexpert regarding the nature of the wounds inflicted upon Kern's body. Here again prejudice will be presumed. For defendant it is strenuously contended with reference to all of these rulings that, whilst some of them may have been erroneous, they were without prejudice, for in any event the court was right in directing a verdict, because plaintiff had not shown that her intestate was free from negligence contributory to his injury.

It is also argued that, even had the rulings been the other way, the answers would have had no bearing upon the question of Kern's contributory negligence. We cannot agree to this contention. True the testimony as to the speed of the east-bound car may, for the purposes of our present inquiry, be said to have been cumulative, and to have no bearing upon Kern's conduct just preceding the accident. But testimony as to the statements of the motorman immediately after the accident occurred might have had a very material bearing upon the question of Kern's conduct before he was struck by the car. It might have been sufficient in itself to take the case to a jury upon an issue presented by the pleadings, wherein defendant is sought to be held liable under the doctrine known as "the last fair chance." Moreover this declaration of the motorman might have shown such conduct on the part of Kern as to negative the thought of negligence on his part. Again the testimony as to the nature of Kern's injuries might have had some bearing upon the question as to how, when, and where he was struck. There is a suggestion in the argument for appellee that Kern was caught between the two cars, or that he was struck by the east-bound car just as he jumped from in front of the west-bound to avoid injury to himself. The case must be reversed because of these erroneous rulings, but as defendant insists that plaintiff's intestate, under the showing made, was guilty of contributory negligence as a

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matter of law, and that there should be no recovery in any event, we shall give some attention to that matter.

The trial court's affirmative finding upon this question was bottomed on the thought that Kern did not see the west-bound car until just as he was about to cross the track ahead of it, was not looking out for it, but on the contrary was moving across Grand avenue without paying any attention to the west-bound car, and that, with no other thought than of the east-bound one, he voluntarily placed himself in a position of danger, either from one car or the other, or from both, and that he cannot recover. This conclusion is based upon what we find to be a misconception of the record. There is as direct testimony as can be produced that defendant saw the west-bound car just after he stepped off the curb on the south side of Grand avenue, and there is also testimony from which a jury would be justified in inferring that he saw it, and was endeavoring to cross to the northwest corner of the street intersection in order that he might board the same. His declared intent, his conduct in going to this place, and his actions after he arrived there, down to the time the west-bound car was stopped, were such as to justify the inference that he saw the car or train, and expected to pass behind the trailer and to board the train at the usual stopping place. Instead of stopping at the usual place, it was brought to a standstill directly in front of him, and just before it stopped the bell was rung, and other noises incident to stopping were made. When this train was stopped Kern turned toward the east to go around behind it, and while in that position was struck by the east-bound car. As the facts upon which the trial court's conclusion was based are not in accord with the record, the conclusion itself is unsound. We are constrained to hold, under the record before us, that Kern saw the west-bound car as he came to Grand avenue, and that a jury may have found that he was crossing the street to get to the usual stopping place, expecting that the train would pass on ahead of him, and get to its customary place for receiving passengers without any danger to him from either the east or west bound cars or trains. But it is argued by counsel that plaintiff's intestate voluntarily placed himself in front of the east-bound car without taking any of the usual and ordinary precautions, and without any reasonable excuse, and for this reason that no recovery may rightfully be had. It must not be forgotten in this connection that a jury would have been justified in finding that, when deceased started from the curb to go to the northwest corner of the street intersection he saw the east-bound car 375 feet away and the west-bound train just a little east of the street intersection. He was justified in believing that the east-bound car would not come at a greater rate of speed than 12 miles per hour, and to act upon that assumption, so that a jury might have found that, had the two cars or trains been

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operated in the usual lawful and customary way, plaintiff might have passed to the northwest corner of the street intersection behind the west-bound train and in front of the east-bound one without any danger to himself. It might also have found that the noise and stoppage of the west-bound train at an unusual place and manner, cutting off Kern's line of travel, so disconcerted and confused him that he did not think of the east-bound one, and was by defendant's own conduct placed in such a hazardous and peculiar position as that his failure to get back off the south track or to look again for the east-bound car was excusable. A street car company cannot, through its own failure to comply with its rules and customs, made for the benefit of the public, place one who is rightfully upon a street in a hazardous position, and then say that in extricating himself therefrom he did not act with that prudence which one would use under ordinary circumstances. If it created the peril, it cannot be heard to say, "Well, you do not act discreetly in avoiding it." The law takes account of the impulses of humanity when placed in dangerous and hazardous positions, and does not expect thoughtful care from the persons whose lives are thus endangered. Moreover, it cannot be said, as a matter of law, that deceased was bound to look a second time for the east-bound car, even if he was blocked by the west-bound one. He had a right to assume, after having located it but a few moments before, that it would not be rushed down upon him at an unusual and dangerous rate of speed. Indeed he had the right to believe it would come no faster than the ordinance permitted. A jury might have found that had the car not been run at an unlawful and unusual rate of speed, Kern could have passed around the west-bound train and out of danger before the east-bound one would have reached him, even after he knew that he had been blocked by the west-bound train. If the case had been submitted to a jury under the record before us, and it had found for plaintiff, we would not have been justified in disturbing it on account of contributory negligence. The principles we have been discussing and the conclusions reached are so well supported by many of our opinions which have recently been filed that we need do no more than refer to them without making quotations from the language used. We call special attention to the following as being closely in point: *Perjue v. Gas Co.*, 131 Iowa, 710, 109 N. W. 280; *Ward v. Co.*, 132 Iowa, 578, 108 N. W. 323; *Hart v. Railroad*, 109 Iowa, 631, 80 N. W. 662; *Doherty v. R. R. Co. (Iowa)* 114 N. W. 186. We need not cite cases in support of the principle that where one places another in a position of peril, he has no right to expect circumspect conduct. In such circumstances it is for a jury to say whether or not the other party acted with that thought and prescience that one placed in a dangerous position was likely to adopt, and whether under all the circumstances he

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was negligent. Indeed the better rule here is that, if a defendant by his own negligent acts throws one off his guard or puts him in peril, the conduct of the person placed in the perilous position will not be regarded as contributory negligence under any circumstances. See Beach on Contributory Negligence, §§ 67, 68, and cases cited.

We reach the conclusion that for the errors pointed out the judgment must be, and it is, reversed.

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(Supreme Court of Iowa, Nov. 23, 1908.)

[118 N. W. Rep. 459.]

Trial—Instructions—Statement of Issues—Use of Pleadings.—Where the issues are simple, and the pleadings are concise, it is not prejudicial for the court to state the issues in the language of the pleader, though copying pleadings as a statement of issues is bad practice.

Trial—Instructions—Statement of Issues—Use of Pleadings.—The practice of stating to the jury what issues are made by the pleadings, as preliminary to a statement of what issues are withdrawn and what issues are submitted, may result in clearness, especially where, in their opening statements, counsel stated the issues made by the pleadings, and evidence was received in support and rebuttal thereof.

Trial—Instructions—Statement of Issues—Use of Pleadings.—Where the petition in an action for death in a street car collision concisely stated specifications of negligence prior to the collision and specifications of negligence occurring after the collision, and the court ruled that there could be no recovery except for negligence occurring after the collision on the theory of last clear chance, the action of the court in following the language of the petition in stating the issues to the jury was not prejudicial to plaintiff.

Trial—Instructions—Construction.—Instructions must be considered as a whole.

Trial—Instructions—Erroneous Instructions Cured by Other Instructions.—An instruction which is ambiguous, or which, standing alone, is erroneous because of omissions, may be cured by another instruction clear on the ambiguous or omitted point.

Trial—Instructions—Erroneous Instructions Cured by Other Instructions.—An unambiguous and affirmatively erroneous instruction is not cured by a correct instruction.

Trial—Instructions—Erroneous Instructions Cured by Other Instructions.—In an action for death in a street car collision, the court, in submitting the issue of negligence after the collision on the theory of the last clear chance, charged that if the jury failed to find that decedent was not guilty of contributory negligence the verdict must

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be for defendant, and stated that decedent was guilty of contributory negligence, and defined contributory negligence as such negligence as contributed to an injury. Held, that the contradiction in the instructions was not cured by a charge authorizing a recovery notwithstanding contributory negligence.

Trial—Instructions—Issues—Manner of Stating.—Where, in an action for death in a street car collision, the court stated the specifications of negligence set forth in the petition, then gave instructions as to the burden of proof as to negligence, contributory negligence, proximate cause, etc., and then singled out the issues submitted to the jury, the issues were not properly stated to the jury, since the instructions left the impression on the minds of the jurors that all the issues stated in the petition were to be submitted.

Street Railroads—Operation—Right of Way over Tracks—Rights of Public.—The fact that a street railroad company owned in fee its right of way, constituting a part of a street, did not affect its relation to the traveling public, where the railroad's patronage was dependent on its relation to the street, and where it maintained a platform on one side of its right of way and partly on the street for the accommodation of passengers.

Street Railroads—Injuries to Persons on Tracks—Contributory Negligence—Crossing Tracks.*—The act of crossing a street car track in front of an approaching car is not per se negligence, and whether it is negligence as a matter of fact or law depends on the circumstances of each case, such as the distance of the approaching car and its speed.

Street Railroads—Injuries to Persons on Tracks—Contributory Negligence—Crossing Tracks.—A person crossing a street car track in front of an approaching car is charged with knowledge of the speed of cars permitted by a municipal ordinance.

Street Railroads—Injuries to Persons on Tracks—Actions—Questions for Jury—Contributory Negligence.*—Where, in an action for death in a street car collision, the evidence showed that, at the time decedent entered into the danger zone, the car was at such a distance from him that he might reasonably believe that he could cross in safety, and his failure to do so was the result of the excessive speed of the car, reasonable minds might differ as to whether he was negligent, and the question of his negligence was for the jury.

Street Railroads—Injuries to Persons on Tracks—Contributory Negligence—Crossing Tracks.—Where the speed of a car was manifest to a person standing where one who was struck by the car had stood before attempting to cross the track in front of it, he was chargeable

*See fourth foot-note appended to *Riedel v. Wheeling Traction Co.* (W. Va.), 29 R. R. R. 768, 52 Am. & Eng. R. Cas., N. S., 768; last foot-note appended to *Carrahan v. Boston & N. St. Ry. Co.* (Mass.), 30 R. R. R. 750, 53 Am. & Eng. R. Cas., N. S., 750; foot-note appended to *Adam v. Union Elec. Co.* (Iowa), 30 R. R. R. 218, 53 Am. & Eng. R. Cas., N. S., 218.

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with knowledge of the speed and chargeable with negligence if he ventured to cross under circumstances indicating that he could not cross without being injured.

Street Railroads—Injuries to Persons on Tracks—Actions—Questions for Jury—Contributory Negligence.—Whether one crossing a street car track in front of an approaching car with knowledge of its speed was negligent held for the jury.

Street Railroads—Injuries to Persons on Tracks—Contributory Negligence—Crossing Tracks.—The fact that one crossing a street car track and a car were both approaching a platform erected for the accommodation of passengers, where the car would presumably stop, is a matter for consideration in determining whether he acted as a reasonably prudent person.

Street Railroads—Injuries to Persons on Tracks—Person Approaching Passenger Platform—Duty to Stop Car.—A motorman, seeing a pedestrian crossing the track to go to a platform maintained for the accommodation of passengers, must stop the car, not only for the purpose of taking him on as a passenger, but for the purpose of avoiding a collision with him.

Appeal and Error—Review—Withdrawal of Issues from Jury—Consideration of Evidence.—On appeal from a judgment withdrawing from the jury issues raised by the pleadings and evidence of plaintiff, the evidence must be considered in the light most favorable to plaintiff.

Appeal and Error—Review—Withdrawal of Issues from Jury—Consideration of Evidence.—On appeal from a judgment withdrawing from the jury issues raised by the pleadings and evidence, the court will not weigh the evidence; that being for the jury.

Street Railroads—Injuries to Persons on Tracks—Actions—Questions for Jury—Contributory Negligence.—Whether a person killed in a collision with a street car while crossing the track was guilty of contributory negligence held, under the evidence, for the jury.

Appeal from District Court, Polk County; Hugh Brennan, Judge.

Action for damages for personal injuries to plaintiff's intestate, resulting in her death. Verdict and judgment for the defendant. Plaintiff appeals. Reversed.

Parrish & Dowell, for appellant.

R. B. Alberson and Carr, Hewitt, Parker & Wright, for appellee.

EVANS, J. The accident in question occurred on July 15, 1905, on Ingersoll avenue, in Des Moines. Ingersoll avenue runs east and west at the point of the accident. The defendant owns the fee of the right of way on which it operates its street car line. On each side of this right of way is laid out a public street, 40 feet in width. These two streets and defendant's right of way,

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between constitute Ingersoll avenue, for all practical purposes. A narrow street, known as "Crescent Drive," intersects this avenue practically at right angles. Near the west line of Crescent Drive and on the south line of its right of way, the defendant maintained a platform for the accommodation of passengers. This platform was partly upon the right of way and partly upon the street proper. The deceased lived a short distance to the northeast of this platform, and was in the daily habit of taking the east-bound car for the city every forenoon. There were two tracks upon the right of way; the north one being used for west-bound cars, and the south one being used for the east-bound cars. On the morning in question, the deceased started in the direction of the platform, traveling south and west. While she was traveling west on the street along the north side of the right of way, and before she reached a point opposite the platform, she was overtaken by a west-bound car, which passed her, obstructing for a few moments her view of the south track. Immediately behind such car, she crossed the north track and started to cross the south track, she was struck by the east-bound car, while crossing such track, and received injuries from which she afterwards died.

One witness fixed the point of the accident as 5 to 10 feet east of the platform. Others fixed it at a greater distance. Before the view of the deceased was obstructed by the west-bound car, the east-bound car had come into view at some distance away. One witness, who was a passenger on the west-bound car, testified that when the deceased passed behind that car the east-bound car must have been from 75 to 100, and possibly 150 feet away. The distance between the two car tracks was about 5 feet. There is evidence tending to show that the east-bound car was traveling at a rate of 25 miles an hour; whereas, the ordinance permitted no greater speed than 12 miles an hour. There was also evidence tending to show that the plaintiff was carried on the fender for some distance before the car was stopped, and that the car was started a second time after it had been once stopped, and after the deceased had been thrown from the fender, and that the deceased received her fatal injuries as the result of the second starting of the car. Plaintiff's petition averred negligence in 12 specifications consecutively numbered. Six of them charged negligence prior to the collision, consisting mainly of the alleged reckless speed and failure to have the car under control, and the other six charged negligence occurring after the collision, consisting mainly in the alleged failure of the motorman to stop the car as soon as he might have done, after discovering the peril of the deceased, and also in permitting the car to start after it had been stopped. The answer was a general denial and a plea of contributory negligence.

1. After hearing the evidence, it was the opinion of the trial

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court that the deceased was guilty of contributory negligence, and that she could not recover on that account, except for negligence occurring after she was struck, upon the theory of the "last clear chance," and he aimed to instruct the jury to that effect. Assuming, for the time being, that the court was right on the question of contributory negligence, the appellant complains of the instructions as given. It is complained, first, that the issues were not properly stated, in that the trial judge embodied in his statement of the issues a copy of the pleadings, and in that he included therein issues which were not to be submitted for their consideration. Under the heading "Statement of the Issues," which was the first statement read to the jury, and which preceded the numbered instructions, the court did state the issues by setting forth a substantial copy of the petition and answer. The practice of copying pleadings as a statement of issues has been often criticised and condemned by this court. *Swanson v. Allen*, 108 Iowa, 419, 79 N. W. 132, and cases there cited. But where the issues are simple, and the pleadings are concise, it has been held not prejudicial for the court to state the issues in the language of the pleader. *Little v. McGuire*, 43 Iowa, 447; *Crawford v. Nolan*, 72 Iowa, 673, 34 N. W. 754. The petition in the case at bar was concise, and the language used therein might well be resorted to by the court, without prejudice to the plaintiff. The greatest difficulty appearing here is that the issues, as so stated, included the 12 specifications of negligence; whereas, the court was about to withdraw from the consideration of the jury 6 of those specifications. It is not, however, wholly unreasonable that the court should state to the jury what the issues were as made by the pleadings, as preliminary to a statement of what issues are withdrawn from their consideration and what issues are left for their consideration. This method may result in clearness to the mind of the jurors as to what things are eliminated, and what things remain. This is especially true if, in their opening statements to the jury, counsel have stated the issues as made by the pleadings, and if on the trial evidence has been received or offered in support or rebuttal of all such issues. It may often serve to clear away confusion in the mind of the jury therefore to set forth: (1) The issues made by the pleadings; (2) that part of those issues determined by the court; (3) the issues remaining for the consideration of the jury. We think therefore that in this case the plaintiff has no ground of complaint from the mere fact that the court followed the language of his petition in stating the issues to the jury. The failure of the court, however, to properly follow up this statement, will be considered later.

2. The appellant complains further that the instructions of the court were contradictory, and that, although the court held the deceased to have been guilty of contributory negligence, it

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nevertheless laid upon the plaintiff the burden of proving freedom from contributory negligence before she could recover even upon the theory of the "last clear chance."

After a statement of the issues, the court presented its instructions in paragraphs numbered from 1 to 19, inclusive. The first six are as follows:

"(1) The burden of proof is upon plaintiff to establish by preponderance of the evidence each of the following propositions: First, that the deceased, Edith McDivitt Lawson, was struck and injured by the defendant's car about the time, at the place, and substantially in the manner alleged in plaintiff's petition; second, that said decedent was not guilty of negligence causing or contributing to her said injury; third, that the defendant was guilty of negligence substantially as alleged by plaintiff and hereafter in these instructions more fully specified; fourth, that said injuries so received by decedent were the direct and approximate result of the negligence of the defendant; fifth, that the estate of decedent has been damaged in some amount thereby. If you find affirmatively as to each and all of the above propositions, then your verdict will be for the plaintiff. If you fail to find affirmatively as to any one of the above propositions, your verdict will be for the defendant.

"(2) As has been stated in the previous instruction, the burden of proof is upon the plaintiff, and before she can recover she must establish by a preponderance of the evidence that the defendant was guilty of one or more of the particular acts of negligence charged in the plaintiff's petition, and that such negligence was the proximate and direct cause of the injury which the plaintiff claims to have sustained on account of the injury and death of decedent. In determining whether the defendant was or was not guilty of the negligence complained of as alleged in plaintiff's petition, you will consider only the negligence alleged pertaining to the stopping or movement of the car in question, after decedent was seen by the motorman in a place of danger, and whether such negligence was the proximate cause of the injury resulting in the death of decedent.

"(3) An accident may happen and an injury ensue thereby without any negligence on the part of any one connected therewith. If you find from the evidence that the injury and death of decedent was the result of mere accident or misadventure, and that the same occurred without any fault, negligence, or failure on the part of the defendant company or its employees to exercise reasonable care and caution in the discharge of its duty in the operation of its car, then the plaintiff cannot recover, and your verdict will be for the defendant.

"(4) The undisputed evidence in this case shows that the deceased approached the railway track of defendant, and, after having so approached the railway track of defendant, waited

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for the west-bound car to pass her, and that, after such car had passed, decedent immediately proceeded across the north track, and the intervening space of almost five feet between the north and south tracks, and stopped in front of an east-bound car on the south track, there passing, and was struck by said car without taking any precautions to avoid the accident. You are instructed as a matter of law that this action of decedent would constitute negligence, and plaintiff cannot recover unless you find as hereinafter instructed. The only question therefore which you have submitted to you for consideration is whether or not the defendant's employees in charge of the east-bound car, which came in contact with the deceased, were guilty of the negligence charged in failing to avoid the injury which resulted in the death of decedent after the deceased stepped from behind the west-bound car and onto the south track of defendant, and she was seen by the motorman in a position of danger. In this connection the only allegations of negligence which you will consider are:

"(5) In relation to the care required of the defendant company, you will only hold it to the exercise of reasonable care, which consists in doing everything which a person of ordinary care and prudence would do, and omitting to do everything which a person of like care and prudence would omit to do. 'Negligence' is defined to be the omitting to do something that a reasonably prudent person would do, or the doing of something which such a person would not do. Under the circumstances of this case, if you find from the evidence that the defendant, by its employees, omitted to do something that a reasonably careful and prudent person would do, or did something that such a person would not do, as to the movements or stopping of said car after decedent was seen by the motorman to be in a place of danger, you would be warranted in finding the defendant guilty of negligence; and, if you so find, and if you also further find that such negligence was the proximate cause of the injury and death of the decedent, your verdict will be for the plaintiff. If, on the other hand, you find that the motorman, Lewis, in operating the car in question which caused the injury and death of the decedent, did everything which a reasonably prudent person would have done at the time of the accident in stopping the car in question, then you would be warranted in finding that the defendant was not guilty of negligence, and, if you so find, your verdict should be for the defendant.

"(6) You have been heretofore instructed, gentlemen, that the decedent was negligent in going upon the track in front of the east-bound car, which struck her; but you are further instructed that, while the law holds that plaintiff cannot recover on account of the contributory negligence of decedent in stepping in front of the east-bound car in the manner in which she did, yet if,

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after the motorman saw her in a place of danger or about to step upon the track in front of the approaching car, he negligently failed to stop said car within a reasonable time or distance under the circumstances shown by the testimony, and such failure was the direct and proximate cause of the injury which resulted in the death of decedent. then your verdict will be for the plaintiff."

From an examination of instruction 1, it will be observed that the jury was instructed, expressly, that, if it failed to find that the decedent was not guilty of contributory negligence, the verdict must be for the defendant. Instructions 4 and 6 expressly stated to the jury that the decedent was guilty of contributory negligence. This presents the alleged contradiction of which appellant complains. It is contended by appellee that instructions 4 and 6 expressly state to the jury that the plaintiff may recover notwithstanding contributory negligence, and this contention is correct; but this does not eliminate the contradiction in the instructions. Appellee contends that the instructions must be considered as a whole, and this is true. It is argued, also, that the error in the first instruction is cured by the statement in the fourth and sixth; but it is cured only in the form of a contradiction. Our previous cases cited by appellee are not in point. It has been held that where an instruction is ambiguous, or where, standing alone, it is erroneous because of some omission, it may be cured by other instructions that are clear upon the omitted or ambiguous point; but where an instruction is free from ambiguity, and is affirmatively erroneous, the error is not cured by a contradiction contained in another instruction. There is no way in such case to determine which instruction the jury may follow. The question presented in this case is almost parallel with *Christy v. City Railway Company*, 126 Iowa, 428, 102 N. W. 194, and the cases therein cited. The error in this case was somewhat emphasized by the sixteenth instruction, which contains the following: "'Contributory negligence' is such negligence as contributes to an injury"—a definition which was quite unnecessary in view of the withdrawal of the question from the consideration of the jury. The natural effect of it would be to impress the jury that the question was still in the case, and emphasize the error contained in instruction 1.

3. Reverting now to the point considered in the first division of this opinion, if the court had followed its "Statement of Issues" with instruction No. 4, and had omitted instructions Nos. 1, 2, and 3, it would have rendered the instruction quite unassailable in the respect complained of. After stating to the jury 12 specifications of negligence, a few only of which are to be submitted, it behooved the court to be prompt in directing the attention of the jury to the very issues to be submitted. By failure of the court to do this, it left the jury for the time being without

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any light as to what was to be submitted for its consideration, or else left the impression that all the stated issues were to be submitted. That part of the instructions denominated "Statement of Issues" was an incomplete statement. It recited the issues made by the pleadings, but it did not advise the jury which of such recited issues were to be submitted to it. The first singling out of the issues to be so submitted occurred in instruction No. 4. This instruction should have been included in the "Statement of Issues," or else it should have immediately followed it. Instructions Nos. 1, 2, and 3, were not only unnecessary and in part erroneous, but they were seriously out of place, in that they were interjected into the subject of stating the issues. The natural effect of such interjecting was to leave the impression on the minds of the jurors that all the issues previously stated were to be submitted to them. For this reason it must be said that the issues were not properly stated, and that the failure was prejudicial to the plaintiff.

Appellant complains of the ruling of the lower court in holding the decedent to have been guilty of contributory negligence. To our minds, this question is a close one. If this were a case involving a steam railroad, we would not hesitate to hold with the trial court. It is urged by appellee that the defendant in this case should stand in the same position as a steam railroad, because it was the owner of the fee of its right of way, and in that sense was not using the public street. We are not able to see that that fact changes the relation of the defendant to the traveling public or protects it against the ordinary rules of liability. Appellee cites no authorities in support of its position in this regard. To our minds, the practical effect as between the defendant and the traveling public is the same, whether the defendant owns its fee or not. Its right of way is a part of the plan of the avenue. Its patronage is dependent upon its relation to the avenue. It maintains a platform upon one side of its right of way and partly upon the streets for the accommodation of its passengers. It necessarily invites pedestrians to cross its right of way from one side of the street to the other. This was true in this particular case. The decedent was a patron living on the north side of the track. She must necessarily cross the track in order to get to the platform on the south side. She was crossing within a few feet of the platform at the time of the accident. It will not do to say that the act of crossing a street car track in front of an oncoming street car is per se negligence. Such tracks are necessarily so crossed daily by thousands of people. Whether it be negligence as a matter of fact, or law, must depend upon the circumstances of the given case. One of the important circumstances is the distance of the oncoming car, and another is its speed. The distance can always be estimated with sufficient accuracy for the purposes of prudence. The speed.

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however, may be deceptive. A pedestrian would doubtless be charged with knowledge of the speed permitted by ordinance. One might see an oncoming car so far away that he might prudently believe that he could safely cross the track, and yet the speed of the car might be so excessive as to overtake him before he had cleared to a place of safety.

In the case at bar, if it must be assumed from the testimony that the decedent stepped in front of a moving car that was already upon her, then the action of the court was right; but if there is evidence tending to show that at the time the decedent entered into the danger one car was at such a distance from her that she might reasonably believe that she could cross in safety, and if her failure to do so was the result of the excessive speed of the car, then reasonable minds might differ as to whether she was negligent, even though all might agree that she did not evince the highest degree of caution. As already indicated in the preliminary statement of the facts, the witness Cleland testified that, when the decedent passed behind the west-bound car, the east-bound car must have been from 75 to 100, and possibly 150, feet west of her. Assuming this statement to be true, can it be said, as a matter of law, that it is per se negligence to cross a street car track ahead of an oncoming car 75 feet or 100 feet distant? The statement of this witness is not inconsistent with the physical possibilities. If the car were traveling at 12 miles an hour, the decedent would ordinarily walk 18 feet while the car traveled 72 feet. This would have given her a margin of safety. If the car was traveling at 25 miles per hour, the decedent could walk only 9 feet, and this would be within the danger zone. Of course, if the speed of the car was manifest to a person standing where the decedent stood, she would be chargeable with knowledge of it, and chargeable with negligence if she ventured to cross under such circumstances; but that, also, is a question for the jury.

It is urged by appellee that this case comes within the rule of *Ames v. Waterloo Transit Company*, 120 Iowa, 640, 95 N. W. 161. We think, however, that it comes within the rule of the cases cited and distinguished in the opinion in the *Ames Case*. *Patterson v. Townsend*, 91 Iowa, 725, 59 N. W. 205, is quite in point. The fact that both the decedent and the car were approaching the platform where the car would presumably stop, and that the decedent was crossing the track east of the platform, is a circumstance to be taken into consideration in determining whether she acted as a reasonably prudent person might. Cleland testified that the west-bound car had gone 50 or 60 feet west of the point of the accident when it occurred. This would indicate that the east-bound car was moving more rapidly than the west-bound car, assuming Cleland's estimates of distances to be correct. If the east-bound car was 75 feet dis-

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tant when the decedent emerged from behind the west-bound car, it was west of the platform. If the motorman saw the decedent, and had reason to believe that she was going to the platform, he was confronted with a double duty to stop his car—to stop it for the purpose of taking on a passenger, and to stop it for the purpose of avoiding a collision. In this discussion, we are, of course, considering the evidence in the most favorable light for the plaintiff. We do not overlook the fact that there is testimony in the record which, if taken as true, would sustain the action of the lower court; but we have nothing to do with the weight of the evidence. That question is for the jury.

Our opinion is that, on the whole record, there is sufficient evidence to go to the jury on the question of contributory negligence.

The judgment below is reversed, and cause remanded for a new trial.

Reversed.

HENRY v. CLEVELAND, C., C. & ST. L. RY. CO.

(Supreme Court of Illinois, Oct. 26, 1908.)

[86 N. E. Rep. 231.]

Railroads—Crossing Accident—Negligence.*—Where a railroad operated a passenger train over a city grade crossing, at the time interstate was struck and killed, at a prohibited rate of speed, and also failed to have a flagman at the crossing, as required by a city ordinance, or to give statutory signals, it was negligent.

Railroads—Crossing Accident—Death of Traveler—Contributory Negligence—Look and Listen.†—The omission of a person to look and listen as he approaches a railroad crossing will not bar a right of recovery in case of collision resulting in injury, if the circumstances are such as will excuse the person injured from a failure so to do.

Railroads—Crossing Accident—Contributory Negligence—Failure to Look and Listen—Question for Jury.—In an action for death of a traveler in a collision at a railroad crossing, whether decedent was negligent in failing to look and listen held for the jury.

*For the authorities in this series on the question whether the violation of ordinances limiting the speed of trains or street cars is negligence, see last foot-note appended to *Southern Ry. Co. v. Hansbrough's Adm'r* (Va.), 28 R. R. R. 1, 51 Am. & Eng. R. Cas., N. S., 1; first foot-note appended to *Butler v. Rhode Island Co.* (R. I.), 28 R. R. R. 322, 51 Am. & Eng. R. Cas., N. S., 322; third foot-note appended to *Ashley v. Kanawha Valley Traction Co.* (W. Va.), 26 R. R. R. 520, 49 Am. & Eng. R. Cas., N. S., 520.

†For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to crossing flagmen and gates, see extensive note, 27 R. R. R. 272, 50 Am. & Eng. R. Cas., N. S.,

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Railroads—Crossing Accident—Rights of Traveler.‡—A traveler approaching a railroad crossing may assume that the railroad company will obey the law and give warning of the approach of trains by proper signals or by the presence of a flagman.

Trial—Instructions—Refusal.—Where the instructions given, when considered as a series, fully and fairly stated the law, the court did not err in refusing defendant's request to charge.

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Coles County; M. W. Thompson, Judge.

Action by Sarah L. Henry, as administratrix of the estate of Thomas N. Henry, deceased, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

George B. Gillespie (L. J. Hackney, Hamlin, Gillespie & Fitzgerald, and H. A. Neal, of counsel), for appellant.

C. C. Lee and E. C. & J. W. Craig, Jr., for appellee.

HAND, J. This was an action on the case, commenced by the appellee, Sarah L. Henry, as administratrix of the estate of Thomas N. Henry, deceased, against appellant, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, in the circuit court of Coles county, to recover damages for the death of her intestate, alleged to have been caused in a street crossing collision at Sixth street, in the city of Charleston, through the negligence of the appellant. The declaration contained four counts. The first count charged negligence in general terms; the second, in a failure to ring a bell or sound a whistle; the third, in running at a high and prohibited rate of speed; and the fourth, in a failure to maintain a flagman at the street crossing where the accident occurred. The general issue was filed, and a trial resulted in a verdict and judgment in favor of appellee for the sum of \$1,999, which judgment has been affirmed by the Appellate Court for the Third District, and a further appeal has been prosecuted to this court.

The evidence fairly tended to establish the following facts: On the afternoon of June 13, 1906, Thomas N. Henry, who was an insurance solicitor and was of the age of 69 years, was driv-

272; last foot-note appended to *Schulte v. Louisville & N. R. Co. (Ky.)*, 29 R. R. R. 203, 52 Am. & Eng. R. Cas., N. S., 203.

See last foot-note appended to *Southern Ry. Co. v. Daves (Va.)*, 30 R. R. R. 455, 53 Am. & Eng. R. Cas., N. S., 455; second foot-note appended to *Kujawa v. Chicago, etc., Ry. Co. (Wis.)*, 30 R. R. R. 195, 53 Am. & Eng. R. Cas., N. S., 195.

‡See fourth foot-note appended to *Smith's Adm'r v. Norfolk & W. Ry. Co. (Va.)*, 29 R. R. R. 715, 52 Am. & Eng. R. Cas., N. S., 715; second head-note of *Stotler v. Chicago & A. Ry. Co. (Mo.)*, 27 R. R. R. 765, 50 Am. & Eng. R. Cas., N. S., 765.

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ing north upon Sixth street, in the city of Charleston, in a buggy drawn by one horse. Sixth street runs north and south, and is intersected almost at right angles by the appellant's railroad tracks. Upon the east side of Sixth street, and adjoining appellant's right of way, is situated a building 104 feet deep, with a frontage of 84 feet upon Sixth street. Just before Henry reached appellant's right of way, a two-horse team driven by William Fleming passed him and drove across appellant's tracks on Sixth street. Henry apparently neither looked nor listened before driving upon said right of way. Just as he reached the main track he discovered, a few rods away, a passenger train approaching from the east at a rate of speed far in excess of the speed limit provided by the city ordinance of the city of Charleston. He then attempted to turn his horse to the left to avoid the approaching train, but was unable to get off the track with the horse and buggy in time to avoid the train. The horse was ruined, the buggy was wrecked, and Henry was thrown out upon the ground or adjoining side tracks, and died that evening from the effect of injuries which he received at the time of the collision.

It is not denied by the appellant that it was running its train, at the time of the accident, at a prohibited rate of speed, or that it failed to have a flagman at the intersection of its right of way with Sixth street, in accordance with the ordinance of the city of Charleston, and the evidence was conflicting as to whether the statutory signals of ringing a bell or sounding a whistle were given. It cannot, therefore, be denied but the appellant was guilty of the negligence charged in the second, third, and fourth counts of the declaration. It is, however, urged that the appellee's intestate was guilty of such contributory negligence at the time he was injured as to bar a recovery. It is not the law of this state that the omission of a person to look and listen as he approaches a railroad crossing will bar a right of recovery in case of a collision resulting in injury, if the circumstances surrounding the accident are such as will excuse the person injured from a failure to look and listen (*Chicago & Alton Railroad Co. v. Pearson*, 184 Ill. 386, 56 N. E. 633); and the question whether the deceased in this case was guilty of negligence in failing to look and listen, we think, under the circumstances of this case, was a question of fact to be determined by the jury (*Chicago & Northwestern Railway Co. v. Hansen*, 166 Ill. 623, 46 N. E. 1071; *Chicago & Alton Railroad Co. v. Lewandowski*, 190 Ill. 301, 60 N. E. 497; *Chicago & Alton Railroad Co. v. Corson*, 198 Ill. 98, 64 N. E. 739; *Illinois Southern Railway Co. v. Hamill*, 226 Ill. 88, 80 N. E. 745).

The statute required the appellant to ring a bell or sound a whistle as it approached said crossing, and the ordinances of the city of Charleston required it not to run its trains in the city at

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a higher rate of speed than 10 miles per hour and to maintain a flagman at the intersection of its right of way with said Sixth street. The appellant violated all of said requirements for the safe operation of its road. The view of appellee's intestate as he approached the appellant's right of way was partially obstructed. A party with a two-horse team, who had just passed him, drove across the right of way of the appellant without apparent danger, and no warning was given said intestate of the approaching train. It cannot be said, we think, therefore, as a matter of law, that he was guilty of such contributory negligence in driving upon the appellant's track as to defeat a right of recovery, or that he acted, after he found himself upon the track, in such a negligent manner as to bar a right of recovery. In *Chicago & Northwestern Railway Co. v. Dunleavy*, 129 Ill. 132, on page 148, 22 N. E. 15, on page 19, this court said: "The question then presents itself whether, if it be admitted that the deceased neither looked nor listened for the train, and also that if he had looked he could have seen it, and if he had listened with his attention concentrated in that direction he could have heard it in time to avoid the accident, such facts would constitute such conclusive proof of contributory negligence on the part of deceased as would have barred a recovery. Undoubtedly a failure to look or listen, especially where it affirmatively appears that looking or listening might have enabled the party exposed to injury to see the train and thus avoid being injured, is evidence tending to show negligence. But they are not conclusive evidence, so that a charge of negligence can be predicated upon them as a matter of law. There may be various modifying circumstances excusing the party from looking or listening; and, that being the case, a mere failure to look or listen cannot, as a legal conclusion, be pronounced negligence per se."

The appellee's decedent had the right to assume that the appellant would obey the law and give him warning of the approaching train by proper signals or by having a flagman at the crossing to notify him of its approach. In *Chicago City Railway Co. v. Fennimore*, 199 Ill. 9, on page 17, 64 N. E. 985, on page 987, it was said: "Anticipation of negligence in others is not a duty which the law imposes. On the contrary, it is a presumption of law that every person will perform the duty enjoined by law or imposed by contract. Where, for instance, the traveler knows that the law requires a railroad company to ring a bell or sound a whistle, he has a right to rely upon the performance of such duty by the company. 2 Jaggard on Torts, p. 970; Shearman & Redfield on Negligence, § 92; *Chicago, Burlington & Quincy Railroad Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708; *St. Louis, Vandalia & Terre Haute Railroad Co. v. Dunn*, 78 Ill. 197; *Thomas v. Railway Co.*, 8 Fed. 732." In view of all of these facts, and of the high rate of speed at which the train

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was approaching the crossing, we are of the opinion the trial court did not err in declining to take the case from the jury, upon the motion of appellant, at the close of all the evidence.

It is also contended that the court misdirected the jury as to the law on behalf of the appellee, and erred in refusing to give to the jury certain instructions offered upon behalf of the appellant. We have carefully examined the instructions given and refused. The issues were simple, and there was but little conflict in the evidence, and a number of instructions were given for each of the parties. The instructions given, when considered as a series, fully and fairly stated the law to the jury. We are of the opinion, therefore, the trial court committed no reversible error in instructing the jury.

Finding no reversible error in the record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

ST. LOUIS & S. F. R. R. CO. v. DYER.

(Supreme Court of Arkansas, Oct. 19, 1908.)

[113 S. W. Rep. 49.]

Railroads—Duty to Keep Highway Crossings in Repair—Use by Extraordinary Vehicles.*—Railroads must use ordinary care to keep highway crossings in a reasonably safe condition for travel and crossing, but need not provide facilities for vehicles other than those in common use in the locality.

Trial—Instructions—Error Cured by Correct Instruction.—In an action against a railroad company for damages to a traction engine, caused by an imperfect highway crossing, the refusal of a charge limiting defendant's duty to maintaining a crossing suitable for the passage of ordinary vehicles was not cured by the giving of a charge on its general duty as to maintaining crossings.

Railroads—Defects in Crossings—Action for Injury to Vehicle—Question for Jury—Negligence.—In an action against a railroad company for damages to a traction engine while attempting to pass a de-

*For the authorities in this series on the subject of the duty of railroads to construct and maintain crossings, see foot-notes appended to *Sample v. Chicago, etc., R. Co.* (Ill.), 30 R. R. R. 434, 53 Am. & Eng. R. Cas., N. S., 434; second head-note of *Cincinnati, etc., Ry. Co. v. Connersville (Ind.)*, 29 R. R. R. 536, 52 Am. & Eng. R. Cas., N. S., 536; last head-note of *Northern Pac. Ry. Co. v. State of Minnesota (U. S.)*, 29 R. R. R. 516, 52 Am. & Eng. R. Cas., N. S., 516.

As to the continuing duty of a railroad company to construct and maintain highway crossings, see extensive note, 23 R. R. R. 460, 46 Am. & Eng. R. Cas., N. S., 460; fifth head-note of *Mayor v. Pennsylvania R. Co. (N. J.)*, 30 R. R. R. 675, 53 Am. & Eng. R. Cas., N. S., 675.

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fective highway crossing, whether plaintiff's servants in charge of the engine were negligent in attempting to cross, notwithstanding the defects, held to be for the jury.

Railroads—Defects in Crossing—Action for Injury to Vehicle—Negligence.—Those in charge of the engine were not bound to reject the only crossing reasonably accessible, unless the danger was so apparent that one of ordinary care would not have attempted to use it.

Appeal from Circuit Court, Crawford County; Jeptha H. Evans, Judge.

Action by Leonard Dyer against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

W. F. Evans and B. R. Davidson, for appellant.
Sam R. Chew, for appellee.

MCCULLOCH, J. Appellee owned a traction engine, and attempted to propel it across appellant's railroad track at a public road crossing, when it was overturned and injured. He sues the company to recover damages, and alleges negligence on the part of the company in failing to properly construct the crossing and keep it in repair. He recovered \$200 damages, and the company appealed.

When appellee's employees in charge of the engine got to the railroad crossing, they found that the planks, which are usually placed next to rails at the crossings to enable vehicles to pass over the rails, were missing, thus leaving the rails exposed, and they procured fence rails, and placed them next to the steel rail, in an effort to temporarily repair the defective crossing. They attempted to propel the engine over the crossing, but the drive wheels failed to climb the steel rail, and slid along until the engine was overturned and thrown down the embankment. The testimony is conflicting as to the precise condition of the crossing. Some of the witnesses say that the dirt was worn away where the planks were missing next to the rails, so that the rails were exposed to a height of 5 or 6 inches; but one of appellant's witnesses says that the dirt was banked against the rail so that it was not exposed more than 2½ or 3 inches. We think there was evidence sufficient to sustain a finding either way on the question of negligence in maintaining the crossing in good repair. Aside from the conflict in the testimony as to the height of the exposed rails, the facts were such that different minds might reach different conclusions as to whether or not ordinary care had been exercised to make the crossing reasonably safe for travel. The court gave the following instruction which is found to be a correct general statement of the law applicable to the case: "The law requires the defendant to use ordinary care to keep the

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crossing of the public highway over its tracks in a reasonably safe condition for travel and crossing. If it used such care as that it is not guilty of negligence, but if it did not use such care as that to keep the crossing in a reasonably safe condition for crossing, the defendant is guilty of negligence." The court refused, however, to give the following instruction requested by appellant: "I charge you that, if the crossing was in such condition that an ordinary vehicle in passing upon the highway could cross in perfect safety, then the company was not negligent in maintaining the crossing in such condition." It was error to refuse this instruction. Railroads in constructing and maintaining highway crossings are not required to anticipate and provide against extraordinary dangers, and are not required to provide facilities for the passing over of vehicles other than those in common use in the locality. Travelers along the highway, when they encounter railroad crossings, are entitled to facilities which are reasonably safe and convenient for vehicles in common use; but, when they attempt to use crossings for other purposes, they have no right to demand extraordinary facilities to meet the necessities of the special use. If a traveler attempts to cross with some kind of a vehicle not in common use, he must take the crossing as he finds it construed for use of ordinary vehicles. *Railway Co. v. Aven*, 61 Ark. 141, 32 S. W. 500; 3 *Elliott on Railways*, p. 383; *Terre Haute, etc., R. Co. v. Clem*, 123 Ind. 15, 23 N. E. 965, 7 L. R. A. 588, 18 Am. St. Rep. 303; *Railway Co. v. Johnson* (Tex. Civ. App.) 85 S. W. 476. Appellant was entitled to have this particular question submitted to the jury, as it narrowed the inquiry to the precise issue of the case; and it is no answer to the demand to say that the court gave a correct instruction in general terms on the subject. *Railway Co. v. Crabtree*, 69 Ark. 134, 62 S. W. 64; *Hamilton Brown Shoe Co. v. Choctaw Mer. Co.*, 80 Ark. 438, 97 S. W. 284.

Other errors of the court are assigned, but we find the proceedings in other respects free from error.

It is urged that the undisputed testimony shows appellee's servants to have been guilty of contributory negligence in attempting to cross with the engine under the circumstances. We do not think so. The testimony made a question for the jury to determine whether or not it was negligent on the part of those servants to attempt to cross, notwithstanding the defects. They were not bound to abandon the only crossing reasonably accessible, unless the danger from using it was so apparent that a person of ordinary care would not have attempted to use it. *St. L., I. M. & Sou. R. Co. v. Box*, 52 Ark. 368, 12 S. W. 757.

For the error indicated the judgment is reversed, and the cause remanded for a new trial.

STEARNS *v.* BOSTON & M. R. R.

(Supreme Court of New Hampshire, Merrimack, Oct. 6, 1908.)

[71 Atl. Rep. 21.]

Negligence—Contributory Negligence.—The conduct of the parties resulting in injury to one of them is to be judged, not by the fact that injury has resulted from the course pursued, but in the light of the circumstances known or discoverable by ordinary care when the course followed was decided upon.

Railroads—Accidents at Crossings—Contributory Negligence.*—That a person killed in a railroad crossing collision drove upon the track knowing the train was approaching does not conclusively establish his negligence.

Railroads—Accidents at Crossings—Contributory Negligence.—Though, in an action for the death of a person at a railroad crossing, there was no direct evidence that decedent was acquainted with the rule of the railroad company prohibiting the running of freight trains over 25 miles an hour, or that he had seen the particular freight train pass at about that hour, yet it did appear that he had been driving to the depot with milk for four years, and that occasionally a freight train would pass ahead of the milk train, it might reasonably be found, in the absence of evidence that the railroad company's employees were accustomed to run freight trains, or the particular train, at that place in violation of its rules, that decedent knew the time it took the train, as it should be and was customarily run, to reach the crossing, even if he was not led to believe by the absence of the station whistle that it would slow down for a stop, and, being aware of the speed of his team, judged that there was time to cross.

Railroads—Accidents at Crossings—Contributory Negligence.—That one of the horses of a person killed at a railroad crossing was somewhat afraid of the cars is to be considered with the other facts upon the question whether a man of ordinary prudence would have done as decedent did.

Railroads—Accidents at Crossings—Contributory Negligence—Question for Jury.—Whether a person of ordinary prudence, having reached the conclusion that his prudent course was to drive over the track ahead of a train, would then have given his whole attention to carrying out the course he had decided upon and not have again looked toward the train, or would have diverted his attention from his team and again looked, is a question of fact.

*See foot-note appended to *Hermeling v. Chicago, etc., Ry. Co.* (Minn.), 30 R. R. R. 234, 53 Am. & Eng. R. Cas., N. S., 234; second foot-note appended to *Powers v. Des Moines City Ry. Co.* (Iowa), 29 R. R. R. 709, 52 Am. & Eng. R. Cas., N. S., 709; last foot-note appended to *Casey v. Boston Elevated Ry. Co.* (Mass.), 29 R. R. R. 245, 52 Am. & Eng. R. Cas., N. S., 245.

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Railroads—Accidents at Crossings—Contributory Negligence.†—An assumption by a traveler on the highway that railroad employees are not approaching the crossing with a reckless disregard of its dangers is not conclusive evidence of negligence in the traveler.

Railroads—Accidents at Crossing—Injury Avoidable Notwithstanding Contributory Negligence.‡—Where trainmen after they discover, or ought to discover, the danger of a traveler at a crossing, can, with the facilities at their command, prevent injury by due care and fail to do so, the railroad company is liable.

Railroads—Accidents at Crossings—Injury Avoidable Notwithstanding Contributory Negligence.—A failure to stop a train after the danger of a traveler on the highway became apparent cannot be held to be the cause of a collision with him where the only situation in which the train could have been stopped must have been one from which no injury would have resulted.

Railroads—Accidents at Crossings—Injury Avoidable Notwithstanding Contributory Negligence.—Where, if trainmen ought to have recognized the danger of a traveler on the highway when they were at a certain point, they could not have stopped the train by applying the brakes, it is immaterial that they did not do so until the train was nearer the crossing.

Trial—Instructions—Evidence.—The action of a train under application of brakes is not a matter of common knowledge, and, there being no evidence tending to show that the trainmen could have checked the speed of the train sufficiently to have permitted a person killed at a crossing to cross, that question was improperly submitted to the jury.

Railroads—Accidents at Crossings—Injury Avoidable Notwithstanding Contributory Negligence.—Where, if an engineer was negligent, it was before a traveler imprudently attempted to cross, and at a time when, if he had seen the traveler, he might have properly assumed

†For the authorities in this series on the subject of the right of a person about to cross railroad tracks to assume that those in charge of trains or street cars will perform their duties, see fourth foot-note appended to *Smith's Adm'r v. Norfolk & W. Ry. Co. (Va.)*, 29 R. R. R. 715, 52 Am. & Eng. R. Cas., N. S., 715; last head-note of *Stotler v. Chicago & A. Ry. Co. (Me.)*, 27 R. R. R. 765, 50 Am. & Eng. R. Cas., N. S., 765.

‡See first foot-note appended to *Norfolk & W. Ry. Co. v. Dean's Adm'r (Va.)*, 26 R. R. R. 784, 49 Am. & Eng. R. Cas., N. S., 784; *Green v. Los Angeles Terminal Ry. Co. (Cal.)*, 18 R. R. R. 192, 41 Am. & Eng. R. Cas., N. S., 192 (duty of engineer after discovery of person's peril); *Little v. Boston & M. R. R. (N. H.)*, 11 R. R. R. 326, 34 Am. & Eng. R. Cas., N. S., 326 (motorman's failure to use ordinary care after discovery of plaintiff's peril was the proximate cause of the accident); *Edwards v. Chicago & A. Ry. Co. (Mo.)*, 2 R. R. R. 333, 25 Am. & Eng. R. Cas., N. S., 333 (negligence of engineer after discovery of plaintiff's peril).

For the authorities in this series on the question whether there may be a recovery for injuries sustained by a highway traveler at a railroad crossing, where he was guilty of contributory negligence, but the

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that he would stop and permit the train to go by, the railroad company cannot be held liable on the ground that, after discovery of the traveler's danger, the engineer might by the exercise of due care have avoided the collision with him.

Railroads—Accidents at Crossings—Failure to Whistle.§—Where a traveler was aware of the approach of a train in time to protect himself notwithstanding it did not whistle, and it does not appear that whistling, after he attempted to cross, would have prevented the collision, the railroad company cannot be held liable for failure to whistle.

Transferred from Superior Court, Merrimack County.

Case or negligent death by Wyman D. Stearns, administrator of the estate of Charles C. Stearns, deceased, against the Boston & Maine Railroad. Verdict for plaintiff, and case transferred from the trial term. Verdict set aside, and new trial granted.

The plaintiff's evidence tended to prove the following facts: The defendants' tracks at South Danbury run nearly north and south. A station and milk platform, situated on the west side of the tracks, are reached by a private way which the railroad has provided over its land for the use of patrons, and which furnishes a means of access to the station from the main street of the village, which is located about 10 rods east of the railroad. The milk train, so called, is due at the station from the north at 8:31 a. m. About 20 minutes past 8 on the morning of November 1, 1905, Charles C. Stearns, the plaintiff's intestate, who had delivered milk at the station for four years, drove a pair of horses attached to a wagon loaded with milk into the private way leading to the station, with the intention of taking his load to the milk train. When he reached a point 57 feet east of the westerly track, he could see in a northerly direction up the tracks. A heavily loaded freight train, about two hours late and not scheduled to stop at South Danbury, was approaching from the north. The plaintiff continued on his way, attempted to pass over the tracks before the approaching train, and was killed by the collision which resulted. The place of collision was not a

trainmen were negligent after they discovered his peril, see last foot-note appended to *Powers v. Des Moines City Ry. Co.* (Iowa), 29 R. R. 709, 52 Am. & Eng. R. Cas., N. S., 709.

§For the authorities in this series on the question whether it is actionable negligence to fail to give crossing signals where the person struck by the train or street car knew of its approach in time to have avoided the collision, see second foot-note appended to *St. Louis, etc., Ry. Co. v. Ferrell* (Ark.), 26 R. R. 742, 49 Am. & Eng. R. Cas., N. S., 742; foot-note appended to *Black v. Bessemer, etc., R. Co.* (Pa.), 26 R. R. 55, 49 Am. & Eng. R. Cas., N. S., 55; first foot-note appended to *Hutchinson v. Missouri Pac. Ry. Co.* (Mo.), 22 R. R. 683, 45 Am. & Eng. R. Cas., N. S., 683; second head-note of *Illinois Cent. R. Co. v. Willis' Adm'r* (Ky.), 22 R. R. 312, 45 Am. & Eng. R. Cas., N. S., 312.

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highway crossing, and was not provided with bars, gates, or flagmen. As Stearns drove toward the tracks and the train approached the station, a man who stood upon the platform waved his hand up and down over the track occupied by the train for the purpose of preventing Stearns from crossing, and also shouted to him with a like motive. Other facts are stated in the opinion. The defendants excepted to the denial of their motions for a nonsuit and the direction of a verdict in their favor and also to the submission to the jury of the question whether the defendants could have prevented the collision by ordinary care after they knew or ought to have known of the danger.

Martin & Howe, for plaintiff.

Mitchell, Foster & Lake (*Fred C. Demond*, on the brief), for defendants.

PARSONS, C. J. Stearns, the plaintiff's intestate, was killed by a collision between the team which he was driving and the defendants' train upon a crossing provided by them for his use. He drove upon the crossing, knowing that a train was approaching. Does this fact, with the subsequent collision, conclusively establish that his attempt to cross was negligent? The contrary was held in *Davis v. Railroad*, 68 N. H. 247, 44 Atl. 388, and *Folsom v. Railroad*, 68 N. H. 454, 38 Atl. 209. The conduct of the parties resulting in injury to one of them is to be judged, not by the fact that injury has resulted from the course pursued, but in the light of the circumstances known or discoverable by ordinary care when the course followed was decided upon. In the former of the cases cited the colliding train was running "at a rate of speed three times as great as that allowed by the defendants' rules." It was said: "It must be presumed that the rules were made to be enforced, and that they were generally obeyed. Although the deceased may not have known of the existence of the rule, yet he was familiar with the crossing, frequently traveled over it, and might reasonably act on the belief that the train would be run at the usual speed in passing the station. There was at least fair room for argument that, if the rule had been obeyed, he would have had sufficient time for crossing without injury or unreasonable risk, and that it would not have been an imprudent act." *Davis v. Railroad*, 68 N. H. 247, 251, 44 Atl. 388; *Nutter v. Railroad*, 60 N. H. 483, 485. In *Folsom v. Railroad*, 68 N. H. 454, 38 Atl. 209, the person injured having been placed in a position of danger without fault on his part, his error of judgment in attempting to escape by crossing the track in advance of the train was held not necessarily negligence. These positions have not been overruled in the later cases upon which the defendants rely. *Gahagan v. Railroad*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426; *Waldron v. Railroad*, 71 N. H. 362, 52

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Atl. 443; *Wright v. Railroad*, 74 N. H. 128, 65 Atl. 687, 8 L. R. A. (N. S.) 832. The first two cases hold that one approaching a railroad crossing is bound to exercise care commensurate with the danger of the situation, and that, where the evidence discloses without question or conflict that no care whatever was exercised, there is no question for submission to the jury, while the latter, overruling *Huntress v. Railroad*, 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600, holds that, in the absence of all evidence, the burden of proof resting upon the plaintiff to show care cannot be supplied by any presumption resting upon the general desire of life or fear of injury.

That certain acts, such as the failure to look or listen upon approaching a railroad crossing, conclusively establish negligence as a part of the cause of an injury, has been repeatedly argued without success in negligence cases. In *Gahagan v. Railroad* it was said: "An exact definition of care and negligence establishing what acts are careful and what acts or omissions are careless at all times, in all places, and under all circumstances, would be a great convenience in judicial administration; but, unless the rule that due care is the care of the ordinarily prudent person under all the circumstances is abrogated, it can never be said logically that the mere presence or absence of certain evidentiary facts will always determine the question without reference to other facts appearing in particular cases." *Gahagan v. Railroad*, 70 N. H. 441, 445, 50 Atl. 146, 55 L. R. A. 426; *Smith v. Railroad*, 70 N. H. 53, 88, 47 Atl. 290, 85 Am. St. Rep. 596; *Roberts v. Railroad*, 69 N. H. 354, 45 Atl. 94; *Davis v. Railroad*, 68 N. H. 247, 249, 250, 44 Atl. 388. Without a departure from the fundamental principles of the law of negligence as understood in this jurisdiction, it cannot be held that the fact that the party injured in a railroad crossing collision went upon the track knowing a train was approaching conclusively establishes his negligence, regardless of all other evidence in the case. "Decisions are to be found wherein such a doctrine has been upheld in other jurisdictions, but they proceed upon a theory so at variance with the law of negligence in this jurisdiction as to be of little value here. The rule in this state is that each case is to be determined in the light of its own circumstances." *Bass v. Railway*, 70 N. H. 170, 172, 46 Atl. 1056.

The apparent conflict of the cases cited by the defendants results mainly from the method of statement. In *State v. Railroad*, 76 Me. 357, 49 Am. Rep. 622, a case particularly relied upon, it is said: "One in full possession of his faculties who undertakes to cross a railroad track at the very moment a train of cars is passing, or when a train is so near that he is not only liable to be but is in fact struck by it, is prima facie guilty of negligence; and, in the absence of a satisfactory excuse, his negligence must be regarded as established." This appears to be

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merely another way of stating the rule in this state: That the plaintiff cannot recover without offering evidence from which his conduct, whatever it was, can reasonably be found to have been prudent. The real ground of the decisions in other jurisdictions, which have been cited, appears to have been that there was nothing in the evidence in the particular cases justifying the conduct of the party injured. If this be the true meaning of the cases, they are not in conflict in principle with the law of this jurisdiction. If it is not, they cannot be followed here. Perhaps it cannot be fairly said that the defendants' position is as broad as above stated, or as might be inferred from the selections from various authorities quoted in brief and argument. The position stated in the brief is that "it could not reasonably be found from the evidence that the deceased exercised due care for his own safety." This requires a consideration of the evidence.

It is conceded, as already stated, that Stearns attempted to cross the track knowing that a train was approaching. There was evidence that at his rate of travel after discovering the train he would have crossed in safety in advance of the train if its speed had not exceeded 25 miles per hour, but he was struck by the train because its speed exceeded 50 miles an hour. The causes of the injury were, therefore, in this view of the evidence, the speed of the train, conceded under the circumstances of the case to warrant the conclusion the defendants were negligent, and Stearns' decision to cross, made upon seeing the train. As there was no evidence Stearns intended to commit suicide, it could be found he made the attempt because of a mistake as to the speed of the train. There was evidence from which it is claimed that Stearns may have reasonably understood that the approaching train was the milk train, which stopped at the South Danbury station, and the speed of which while slowing down for the stop would be much less than 25 miles per hour. The train was, however, a freight, over an hour behind time, running about 10 minutes in advance of the regular time of the milk train. Whether Stearns understood the train to be the milk train or recognized it as a freight it is claimed is mere speculation; but assuming he knew, or must be held to have known, the train was a freight, it does not follow he must be charged with knowledge of its excessive speed. The regular speed of this freight at this point, according to the time-card, was a fraction over 22 miles an hour, and the rules of the road prohibited the running of freight trains over 25 miles an hour. Another rule required a long blast of the whistle upon approaching stations at which no stop was to be made. There was evidence that this whistle was omitted, or not properly given. There was no direct evidence that Stearns was acquainted with the rules of the road, or had seen this particular freight pass at about this hour; but it appeared that he had been driving to this train with milk for four

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years, and that occasionally a freight would pass ahead of the milk train. It is to be presumed the defendant's road is operated in accordance with the rules, and it could be inferred that Stearns, by observation during his four years' attendance, had become acquainted with the customary manner of moving trains. In the absence of evidence that the defendants' employees were accustomed to run freight trains, or this train at this place, in violation of the rules of the road, it might reasonably be found that Stearns knew the time it took the train, as it should be and was customarily run, to reach the crossing, even if he was not led to believe by the absence of the station whistle that it would slow down for a stop, and, being aware of the speed of his team, judged there was time for him to cross—a conclusion which would have been correct except for the unusual speed of the train. There was also evidence that one of his horses was somewhat afraid of the cars. This fact, though not controlling, is evidence to be considered with the other facts in the case upon the question whether a man of ordinary prudence, placed in the situation Stearns was, with the knowledge he had or ought to have had, would have done as he did. As there was evidence tending to establish a belief in his mind that the train speed did not exceed 25 miles an hour, that question, if material, could not be taken from the jury. Nor can it be said that there was no evidence tending to show that the ordinary man would not have acted as Stearns did, in the face of the evidence that, upon the facts as it might be found he understood them, the course he pursued was safe. It is not the fact that prudent persons do not cross a railroad track when they know a train is approaching. To do so may be safe or dangerous. "No inflexible rule can be laid down as to the distance before a moving train within which it is safe to attempt a crossing. It will depend upon the rate of speed at which the train is moving and the condition of the person. • Each case, therefore must measurably depend upon its own facts." *State v. Railroad*, 69 Md. 339, 14 Atl. 685, 688. It is urged that, although Stearns looked at and saw the train when he was 57 feet from the crossing, he did not again look toward the train until just as the engine was upon him. Whether a person of ordinary prudence, having reached the conclusion that his prudent course was to drive over the track, would then have given his whole attention to carrying out the course he had decided upon, or would have diverted his attention from his team, is a question of fact. "We have to deal with man as we find him. When we get information that fixes upon our minds an impression that a certain state of facts exists, we act upon that impression. We satisfy ourselves that we are right, and then go ahead. At least ordinarily prudent men do this. Dr. Gratiot [the plaintiff] saw an engine half a mile away that he supposed was on a switch, and, of course, not approaching him at all. He

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accepted this as a fact and acted on it; and there would be no more reason in requiring him to look constantly up the track to learn whether he was mistaken about this supposed fact than to require men in their multitudinous affairs to hesitate at every step and question not only the correctness of their judgment, but even the truth or falsity of what seem to be the facts that surround them. It would be a great boon to humanity if no mistakes could occur; but to require men to hesitate to act upon what seems manifest to their eyes and ears, simply because it is possible that they may not have seen and heard the fact as it is, would virtually stop business and commerce." *Gratiot v. Railroad*, 116 Mo. 450, 21 S. W. 1094, 16 L. R. A. 189; *Bonnell v. Railroad*, 39 N. J. Law, 189.

It has been held in several cases that the reliance of the engineer upon the assumption that a person whom he sees approaching a crossing at a distance will stop and allow the train to go by is not even evidence of negligence; and it can hardly be held that the highway traveler's assumption that the railroad employees are not approaching the crossing with a reckless disregard of its dangers, in the absence of evidence of such fact, is conclusive evidence of negligence in the traveler. There was no error in the denial of the motions for a nonsuit and verdict. But, although reasonable men might on the evidence have found Stearns' conduct careful, they might also have found it careless. The plaintiff claimed that if Stearns was negligent in attempting to cross the track, and thereby got himself into a position of danger from which he could not extricate himself, yet the defendants' servants in charge of the train in the exercise of due care ought to have seen him in season to have slackened the speed of the train and averted the accident. The defendants excepted to the submission to the jury of the question whether the defendants could have prevented the collision after seeing Stearns in a place of danger. The defendants conceded as a matter of law that if the trainmen, after they discovered or ought to have discovered the danger, could with the facilities at their command have prevented the injury by due care, the defendants are liable. *Gahagan v. Railroad*, 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426; *Yeaton v. Railroad*, 73 N. H. 285, 61 Atl. 522. The ground of the exception is that no evidence was produced before the jury upon which it could be found that the speed of the train could have been so slackened as to prevent the injury after the peril became apparent. Stearns saw the train when 57 feet from the crossing, whipped up his team, and attempted to cross. It was at this point he came in sight of the train, and the trainmen, if observant, could and should have discovered his attempt to cross. At this time the train was about at the underpass; one witness placing the engine just north of it, so that the greatest distance of the train from the crossing upon any evidence in the case was

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435 feet. The witness Chase testified that with the brakes in working order the train could have been stopped in 300 to 350 feet, if the speed did not exceed 25 miles an hour. If the jury believed the testimony of the trainmen that the speed did not exceed 25 miles an hour, and that of the plaintiff's expert Chase, and found that the brakes were in working order, they could have found that after the trainmen knew or ought to have known of Stearns' attempt to cross they could have stopped the train before it reached the crossing. But this would not authorize a verdict for the plaintiff, because both parties concede, and the fact is amply apparent, that in such case no injury could have resulted from a failure to apply the brakes, because Stearns, if the train was at or above the underpass when he started up his team, must have passed the crossing and reached a place of safety before the train reached the crossing, if its speed did not exceed 25 miles an hour. Stearns was driving at a slow speed, estimated at 4 miles an hour, until he observed the train, when he started up his horses into a 10-mile gait. If his speed after he attempted to cross averaged only 7 miles an hour, or 10 feet per second, in 8 seconds he would have traveled 80 feet, passed over the crossing, and reached a place of safety. During the same length of time the train at 25 miles per hour, or $36\frac{1}{3}$ feet per second, would have traveled 290 feet, or less than the least distance in which the witness Chase estimates it could have been stopped. But the train and Stearns' team met on the crossing. Therefore either the train was much nearer the crossing or proceeding at much greater speed, or the defendants' experts were right and the plaintiff's wrong as to the distance within which the train could be stopped.

Whatever view of the facts is taken, it cannot reasonably be found that failure to stop the train after Stearns' peril became apparent was the negligent cause for the injury, upon the evidence that the only situation in which the train could have been stopped must have been one from which no injury would have resulted. But the evidence of the experts on both sides as to the distance within which the train could be stopped was merely opinion, and was founded upon the proper working of the brakes. The defendants' evidence was that when the fireman, observing that Stearns was attempting to cross, called "Whoa," the engineer pulled the brake into emergency position and applied the sand, and that that was all that could be done to check the train. There was no evidence that this was not done, or that anything else could have been done. The only ground for controversy was when it was done; and the only ground for negligence in this respect that this action was not taken as soon as it should have been. Whether the brakes were applied before the station was reached, as the trainmen testified, or at the time of or just after the collision, as evidence offered by the plaintiff had some ten-

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dency to establish, it was therefore demonstrated that, with the brakes in the condition in which they were and the speed of the train as it actually was, the length of the train (1,400 feet) was required to bring the train to a stop.

It is suggested that, on the evidence as to the distance within which the train was stopped, the expert evidence, and the failure to show an inspection of the brakes after the accident, it could be found the brakes were not in working order, and that their failure to work was the reason the train did not stop in a less distance. This may be so. But the fact that the brakes were out of order tends to show, not that the train could have been more promptly stopped, but relieves the trainmen from the charge of negligence in not making a stop within less distance. As the trainmen could not have stopped the train by applying the brakes when the train was at the underpass, if they ought to have recognized Stearns' peril at that point, it is immaterial that they did not do so until the train was nearer the crossing. The only answer suggested to this reasoning is that, though the train could not have been stopped before reaching the crossing, its speed could have been slackened and time allowed Stearns to cross. In *Yeaton v. Railroad*, 73 N. H. 285, 61 Atl. 522, and in *Duggan v. Railroad*, 74 N. H. 250, 66 Atl. 829, there was evidence that, if the brakes had been applied, there would have been no accident, even if the train was not stopped. In *Folsom v. Railroad*, 68 N. H. 454, 38 Atl. 209, the evidence was that less than six inches of the back of the deceased's sleigh was within the zone of danger when the train reached it. It was apparent that, if the speed of the train had been a tenth of a second less, there would have been no accident. In this case the engine struck the rear quarters of the horses. To have prevented the accident, the train must have been delayed so that the wagon in which Stearns was riding could have entered upon the track, crossed it, and passed beyond the overhang of the engine before the crossing was reached by it. Although the time necessary for Stearns to have reached a position of safety may be estimated from the evidence, and there was conflicting evidence as to the distance within which the train could be brought to a stop when running at 25 or 50 miles an hour, there was no evidence of the time within which either operation could be performed. Neither was there any evidence of the action of the brakes in checking the speed of the train.

The plaintiff appears to suggest in argument that the application of the brakes results in a decrease of speed directly proportionate to the distance traversed. The witness Clark testified that a train running 25 miles an hour could be stopped in 300 to 350 feet, if running 40 to 50 miles, in 1,300 to 1,400 feet, from which it can be argued that the rate at which the speed diminished increases with the distance traversed; for it would seem

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to follow that with the brakes set when the speed was diminished to 25 miles an hour 350 feet more would bring the train to a standstill, and that it would therefore require at least 950 to 1,050 feet to reduce the speed from 50 to 25 miles. This may not be so. The action may be just the other way, more effective at first and having a less retarding effect for some reason or other the longer the distance traveled, or the retarding effect may be exactly proportional to the distance. However this may be, the action of a train under application of the brakes is not a matter of common knowledge. There was no evidence before the jury tending to show that the trainmen could have checked the speed of the train sufficiently to have permitted Stearns to cross in safety. A conclusion that an earlier application of the brakes, at any time after Stearns had created the danger by his negligence, would have prevented the injury, would have been mere conjecture founded on no evidence. The question was improperly submitted to the jury, because there was no evidence upon which it could be determined in the plaintiff's favor.

There was evidence that one Woodward, who saw Stearns when he turned into the passageway, stood on the station platform and waved his arms across the track, motioning to Stearns to stop; and it is claimed that the train was then opposite Langley's house 800 feet away, and that Woodward's motions, though not intended as a signal to the train to stop, should have been seen and so interpreted by the engineer, and that at that distance the train could have been stopped or the speed slackened sufficiently to have prevented the injury. It does not seem reasonable to convict the engineer of negligence because he did not understand a signal for Stearns as one for him. But, however that may be, if the engineer was negligent at this time, it was before Stearns imprudently attempted to cross, and at a time when, if he had seen Stearns, he might have properly assumed Stearns would stop and permit the train to go by. Except for Stearns' starting up his team, the engine would not have collided with the team. The only collision possible would have been between Stearns' horses and the side of the train. The trainmen's negligence before Stearns had created the danger by his negligence could not be held a failure to save him from the result of his own want of care.

The failure to whistle at this time as a cause of injury stands on the same ground, with the further objection that the purpose of the whistle is to give notice of the approach of the train, of which it is conceded Stearns was aware in season to protect himself. After he attempted to cross with knowledge of the approaching train, and was engaged in the attempt, there is no evidence further signaling by the whistle, if there was opportunity for it, would have stopped Stearns' team or prevented the injury.

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There is no occasion to consider the remaining exceptions. The exceptions to the denial of the motions for a nonsuit and verdict are overruled. The exception to the submission of the second issue to the jury is sustained.

Verdict set aside. New trial granted.

DOUGLASS v. SOUTHERN RY. CO. et. al.

(Supreme Court of South Carolina, Nov. 28, 1908.)

[63 S. E. Rep. 5.]

Negligence—Contributory Negligence—Negligent Failure to Act.*

—Lack of vigilance or a negligent failure to act may constitute contributory negligence as well as negligent action.

On petition for rehearing. Petition refused.

For former opinion, see 62 S. E. 15.

McDonald & McDonald, for petitioner.

PER CURIAM. The court has carefully examined the petition for rehearing in this cause. The court adheres to the doctrine laid down in a number of cases that lack of vigilance or a negligent failure to act may constitute contributory negligence as well as negligent action. *Easler v. Ry. Co.*, 59 S. C. 311, 37 S. E. 938; *Sanders v. Aiken M. Co.*, 71 S. C. 58, 50 S. E. 679; *Bolton v. Tel. Co.*, 76 S. C. 532, 57 S. E. 543; and *McLean v. R. R. Co.*, 81 S. C. 100, 61 S. E. 1071.

In this case the appellant's position was that the following language used in the charge of the circuit judge was inconsistent with the principle of law: "Culpable negligence of the plaintiff, which contributed to the injury, must always defeat the action, but the nature of the primary wrong has much to do with the judgment whether or not the contributing fault was of a negative character, such as a lack of vigilance, and was itself caused by or would not have existed but for the primary wrong. It is not in law to be charged to the injured one, but to the original wrongdoer." The view of the Justices who concurred in the ruling opinion was that this language of the request to charge, above quoted, was too vague and obscure to mislead the jury into supposing that contributory negligence might not be of a negative

*For the authorities in this series on the subject of definitions of contributory negligence, see fifth foot-note appended to *Spiking v. Consolidated, etc., Co. (Utah)*, 27 R. R. R. 457, 50 Am. & Eng. R. Cas., N. S., 457; second head-note of *Chesapeake & O. Ry. Co. v. Wilson's Adm'r (Ky.)*, 27 R. R. R. 238, 50 Am. & Eng. R. Cas., N. S., 238; note, 17 R. R. R. 236, 40 Am. & Eng. R. Cas., N. S., 236.

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character, especially as the circuit judge had charged explicitly on the subject of contributory negligence. The dissenting Justices thought differently; but after careful consideration, we are satisfied that a reargument of the case would not further enlighten the court or produce any different result. The petition is therefore refused.

O'MARA v. NEWTON & N. W. R. Co.

(Supreme Court of Iowa, Nov. 19, 1908.)

[118 N. W. Rep. 377.]

Railroads—Injuries to Animals—Evidence—Similar Facts.*—Where plaintiff's horse ran or jumped over a cattle guard from the highway to the inclosed portion of defendant's right of way, and was struck by a train and killed, plaintiff, in an action for damages, was entitled to show that other stock had at other times passed over the same cattle guard, as bearing upon the question whether or not the cattle guard in question was proper and sufficient.

Railroads—Injuries to Animals—Evidence—Similar Facts.*—In an action against a railway company, based on the insufficiency of a certain cattle guard, the fact that similar cattle guards to the one in question have been found to be insufficient to turn stock may be shown.

Railroads—Injury to Stock—Insufficient Cattle Guard.†—In an action against a railway company for loss of a horse which had crossed a cattle guard, and was killed by a train, the fact that the horse crossed the cattle guard in question in front of the moving train, is not in itself evidence of the improper construction or insufficiency of the

*See first foot-note appended to *Staples v. Rhode Island Sub. Ry. Co.* (R. I.), 27 R. R. R. 315, 50 Am. & Eng. R. Cas., N. S., 315; first foot-note appended to *Finley v. Louisville Ry. Co.* (Ky.), 27 R. R. R. 183, 50 Am. & Eng. R. Cas., N. S., 183; first foot-note appended to *Southern Ry. Co. v. Winchester's Ex'x* (Ky.), 26 R. R. R. 736, 49 Am. & Eng. R. Cas., N. S., 736; fifth head-note of *Dunbar v. Central Vermont R. Co.* (Vt.), 26 R. R. R. 413, 49 Am. & Eng. R. Cas., N. S., 413; second head-note of *Di Giorgio, etc., Co. v. Pennsylvania R. Co.* (Md.), 26 R. R. R. 343, 49 Am. & Eng. R. Cas., N. S., 343; first head-note of *Central of Georgia Ry. Co. v. Hughes* (Ga.), 26 R. R. R. 62, 49 Am. & Eng. R. Cas., N. S., 62; first head-note of *Union Pac. R. Co. v. Edmondson* (Neb.), 26 R. R. R. 173, 49 Am. & Eng. R. Cas., N. S., 173; sixth head-note of *Woodward v. Chicago, etc., Ry. Co.* (C. C. A.), 25 R. R. R. 673, 48 Am. & Eng. R. Cas., N. S., 673; second head-note of *Lexington Ry. Co. v. Herring* (Ky.), 25 R. R. R. 625, 48 Am. & Eng. R. Cas., N. S., 635.

†For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to cattle guards, see foot-note appended to *Campbell v. Iowa Cent. Ry. Co.* (Iowa), 12 R. R. R. 601, 35 Am. & Eng. R. Cas., N. S., 601; foot-note appended to *Carrollton, etc., Ry. Co. v. Lipsey* (Ala.), 23 R. R. R. 337, 46 Am. & Eng. R. Cas., N. S., 337.

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guard, but the manner in which the horse approached and crossed the guard may be considered in connection with other facts and circumstances in the case.

Railroads—Injuries to Stock—Insufficient Cattle Guards—Evidence.—Under Code, § 2055, providing that a railway company failing "to fence * * * against live stock running at large and maintain * * * sufficient cattle guards * * * where the right to fence or maintain cattle guards exists, shall be liable to the owner of any stock killed or injured by reason of the want of such fence or cattle guards for the full amount of the damages sustained * * * and to recover, it shall only be necessary to prove the loss of or injury to his property, * * *" it is not sufficient to make a prima facie case for the owner of property to merely show the injury to the animal after it had crossed over the cattle guard from the highway to defendant's right of way, but he must further show defendant's failure to have a sufficient fence or cattle guard at the place.

Appeal from District Court, Jasper County; Byron W. Preston, Judge.

Action to recover damages for injury to plaintiff's horse caused to it by being struck by defendant's train on its right of way at a place where it had a right to fence; such injury resulting in the death of the horse. There was a verdict and judgment thereon for plaintiff, and defendant appeals. Reversed.

Morgan & Korf and Dyer & Hull, for appellant.

Tripp & Tripp, for appellee.

McCLAIN, J. Plaintiff's horse, which was running at large on the highway prior to the injury complained of, ran or jumped over a cattle guard from the highway to the inclosed portion of the right of way just in front of a moving engine of defendant, and received injuries which resulted in its death.

1. Over defendant's objection, plaintiff's witnesses were allowed to testify that other stock had at other times passed over the same cattle guard, and the court instructed the jury that such evidence might be considered as bearing upon the question whether or not the cattle guard in question was proper and sufficient, in connection with other evidence on the subject. In this respect no error was committed. While in general the happening of similar accidents in no way connected with the accident in controversy, and not shown to have occurred under similar conditions, or for similar causes, may not be admissible for the purpose of showing the negligence of a defendant with reference to such accident (*Croddy v. Chicago, R. I. & P. R. Co.*, 91 Iowa, 598, 60 N. W. 214; *Mathews v. Cedar Rapids*, 459, 45 N. W. 894, 20 Am. St. Rep. 436; *Hudson v. Chicago & N. W. R. Co.*, 59 Iowa, 581, 13 N. W. 735, 44 Am. Rep. 692), here the question was not as to the cause of the accident, about which

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there was no controversy, but as to whether the cattle guard was reasonably sufficient. The purpose of a cattle guard is to prevent stock from passing along the right of way from the portion thereof which is in the highway to that portion which is inclosed, and the fact that in general it does not serve to afford such restraint is certainly evidence that it is not reasonably sufficient for the purpose for which it is required. The fact that similar cattle guards to the one in question had been found to be insufficient to turn stock might have been shown. *Timins v. Chicago, R. I. & P. R. Co.*, 72 Iowa, 94, 33 N. W. 379; *Payne v. Kansas City, St. J. & C. B. R. Co.*, 72 Iowa, 214, 33 N. W. 633. And certainly the fact that the particular guard in question has been shown to be insufficient to deter stock in general from crossing may be properly submitted for the consideration of the jury. *Bowen v. Flint & P. M. R. Co.*, 110 Mich. 445, 68 N. W. 230; *Lake Erie & W. R. Co. v. Murray*, 69 Ill. App. 274; *Lake Erie & W. R. Co. v. Helmericks*, 38 Ill. App. 141. The fact that the horse which was injured crossed the cattle guard in question in front of the moving engine was not in itself evidence of its improper construction, nor its insufficiency. *Barnhart v. Chicago, M. & St. P. R. Co.*, 97 Iowa, 654, 66 N. W. 902. And the jury was so instructed, but the court properly said, in this connection, that the manner in which the horse approached and crossed the cattle guard might be considered in connection with the other facts and circumstances in the case. *Timins v. Chicago, R. I. & P. R. Co.*, 72 Iowa, 94, 33 N. W. 379.

2. The court instructed the jury that, by establishing the injury to the horse after it had crossed over the cattle guard from the highway to the defendant's inclosed right of way, plaintiff made out a *prima facie* case, and the burden shifted to the defendant to show that it was maintaining at that place a proper and sufficient cattle guard; that is, one reasonably adapted to the specific purpose. Counsel for appellant and other counsel, who have by leave of the court filed an additional brief in this case, insist that only on proof of the animal having come upon the right of way where the company had failed in its duty to construct a sufficient cattle guard, or over a cattle guard which it had negligently allowed to become insufficient, would the plaintiff make out a *prima facie* case, and that the instruction was therefore erroneous. The determination of this question involves a consideration of a section of the Code, the material portion of which is as follows: "Sec. 2055. Any corporation operating a railway, and failing to fence the same against live stock running at large and maintaining proper and sufficient cattle guards at all points where the right to fence or maintain cattle guards exists, shall be liable to the owner of any stock killed or injured by reason of the want of such fence or cattle guards for the full amount of the damages sustained by the owner on account

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thereof, unless it was occasioned by his willful act or that of his agent; and to recover the same it shall only be necessary for him to prove the loss of or injury to his property. * * *” We are directly concerned only with the proper rule to be applied when the fence or cattle guard at the point where the animal comes upon the right of way is insufficient as originally constructed; for the testimony in this case related entirely to the insufficiency of the form of cattle guard constructed by the defendant, and not to its subsequently becoming out of repair. But it will be impracticable to discuss the correct rule to be applied in such cases without referring to the decisions in the cases where the fences or cattle guard has come to be insufficient after its original construction. It is to be noticed that prior to the adoption of the Code of 1897, containing the section above quoted, the analogous statutory provision had reference only to failure to fence, but for present purposes we may assume that the failure to maintain proper and sufficient cattle guards is put on the same footing as failure to fence, and that in this respect the decisions under the prior statutory provision in relation to failure to fence are applicable not to the failure to construct and maintain a sufficient cattle guard.

The first case, so far as we can discover, in which this court applied the statutory provision in a case where it was contended that there had been an original failure to fence, is that of *Brentner v. Chicago, M. & St. P. R. Co.*, 68 Iowa, 530, 23 N. W. 245, 27 N. W. 605, in which the court sustained an instruction throwing upon the company the burden of proving that it had built a good and sufficient fence. The objection made to this instruction was that as plaintiff alleged the injury to have been occasioned by the failure of the company to build and maintain a sufficient fence, which allegation was denied in the answer, the burden was necessarily upon plaintiff to establish such allegation, but the court citing the statute said: “The effect of this provision is to make the fact of the injury or destruction of the property on the railway track *prima facie* evidence of negligence on the part of the corporation.” In the next case involving an original insufficiency of the fence (*Morrison v. Burlington, C. R. & N. R. Co.*, 84 Iowa, 663, 51 N. W. 75) the court, without referring to the Brentner Case, held that an instruction was properly refused which called for proof of knowledge of the defective condition of the fence which as originally constructed was insufficient, and in *Wall v. Des Moines & N. W. R. Co.*, 89 Iowa, 193, 56 N. W. 436, involving an alleged failure to fence, an instruction was held erroneous which stated that, to entitle the owner to recover, it was only necessary for him to prove the injury to or destruction of his property. In the case last cited the court referred to the conclusion stated in *Manwell v. Burlington, C. R. & N. R. Co.*, 80 Iowa, 662, 45 N. W. 568, with reference to the burden of

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proof under the statute when the animal is shown to have come upon the right of way through a fence which has become defective; that is, by reason of negligence of the company in failing to keep closed a gate at a private crossing. The language quoted from that case is as follows: "The statute provides that, 'in order to recover, it shall only be necessary for the owner to prove the injury or destruction of his property;' but it is manifest that, in order to recover, the owner must prove other facts, among which are that the property was of the kind contemplated by the statute, that the corporation was engaged in operating a railway, and that the stock was injured or killed by reason of its failure to fence at a point where the right to fence existed. The provision quoted was designed to change the burden of proof to some extent, and thus enable the owner to make a *prima facie* case by proving fewer facts than would be required in the absence of the statute, but it was not designed to dispense with all proof on the part of the owner, excepting as to the injury or destruction of his property. The various provisions of the statute must be construed together, and the purposes which they were designed to accomplish must be considered. When so treated, the statute will be found to fully authorize the conclusion we have reached, and to contain no language which makes a different construction necessary." It is true that the immediate question before the court was not an instruction, as to burden of proof or *prima facie* sufficiency of the evidence, but the language quoted has since been frequently referred to as stating the correct rule in that respect. See *Schmitt v. Chicago, St. P. & K. C. R. Co.*, 99 Iowa, 425, 68 N. W. 715; *Norman v. Chicago & N. W. R. Co.*, 110 Iowa, 283, 81 N. W. 597; *Daily v. Chicago, M. & St. P. R. Co.*, 121 Iowa, 254, 96 N. W. 778. In the latest case in which the court refers to failure of the company to construct a fence as distinguished from its negligence in maintaining the fence in good condition (*Craig v. Wabash R. Co.*, 121 Iowa, 471, 96 N. W. 965) the court uses this language: "The company had the right to fence its track at the point where the horse escaped. It failed to do so. Upon proof of this and the injury to the animal by one of its engines passing over the track, a *prima facie* case was made out for plaintiff." It is to be noticed that in this statement of the rule it is proof of the failure of the company to fence at a place where it had a right to do so which in connection with proof of injury on the right of way to the animal which has come thereon by reason of the failure to fence makes out a *prima facie* case for the plaintiff. It is evident, therefore, that the court while continuing to cite the *Brentner Case* has disregarded it, and applied in cases of entire failure to fence or original insufficiency of fence the rule previously recognized with reference to a fence which has become defective, to wit, that, before a *prima facie* case is made out, the plaintiff

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must show either original want or subsequent insufficiency of a fence at the place where the animal comes upon the right of way. See *Johnson v. Chicago, R. I. & P. R. Co.*, 55 Iowa, 707, 8 N. W. 664; *Bothwell v. Chicago, M. & St. P. R. Co.*, 59 Iowa, 192, 13 N. W. 78; *Butler v. Chicago & N. W. R. Co.*, 71 Iowa, 206, 32 N. W. 262. The Brentner Case has, in effect, been overruled, and we think we could not now follow it without going contra to all the more recent cases on the subject. By this construction we do not deprive the statute of some substantial effect, and, as we think, all the effect it was ever intended to have with reference to the making out of a *prima facie* case. When the plaintiff shows a defective or insufficient fence that is that there was no such fence at the time as the statute requires, the burden is then thrown upon the company to show that the defect was without its knowledge in the exercise of ordinary care; that is, that, after having constructed a sufficient fence, a defective condition had arisen without its knowledge, and that this condition had not continued for such length of time that in the exercise of a reasonable care it should have been discovered. See *Wristlin v. Chicago, M. & St. P. R. Co.*, 124 Iowa, 170, 99 N. W. 697. This is the view of the statute taken in the Daily Case, *supra*, in which it is said that the animal having gone from the open way over a defective fence, and upon the track of the company, where it was injured, a *prima facie* case of negligence on the part of the company must be said to have been made out, and the burden was then shifted to the defendant to show its freedom from negligence. A similar statement of the rule is found in *Mikesell v. Wabash R. Co.*, 134 Iowa, 736, 112 N. W. 201, where this language was used: "The evidence that there was no fence along the right of way for a space of 300 feet, and that there had been none for more than a year, was undisputed. Proof that the mare was injured by reason of the want of a fence in connection with the operation of a railroad made out a *prima facie* case for the plaintiff, and the burden was upon the defendant to show the erection of a good and sufficient fence." This construction is in harmony with the necessary construction of Code, § 2054, which in substantially the same language was in force prior to the adoption of the present Code, and, in the absence of any reference in the section corresponding to Code, § 2055, a failure to maintain or construct cattle guards was the sole statutory provision on that subject; for, with reference to cattle guards, the provision was and still is that the company shall make proper cattle guards where the railway company "neglecting or refusing to comply with the provisions of this section shall be liable for all damages sustained by reason of such refusal or neglect, and it shall only be necessary in order to recover for the injured party to prove such neglect or refusal." If with reference to cattle guards we do not give to

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Code, § 2055, as it now stands the construction above indicated, we shall have on that subject two inconsistent rules, the one that plaintiff can recover merely upon proof of the injury, the other that he can only recover on proof of the neglect or refusal of the company to construct a cattle guard by reason of which neglect or refusal the injury has happened.

Counsel for appellee rely upon decisions under Code, § 2056, with regard to recovery of damages sustained from injury to property occasioned by fire set out or caused by the operation of a railway, and insist that, as proof of damages by the fire set out by the company make out a *prima facie* case of liability without evidence of negligence on the part of the company, we ought to hold that proof of injuries to stock on the right of way in the operation of the road make out a *prima facie* case of failure or neglect of the company to maintain a sufficient fence. They rely upon *Small v. Chicago, R. I. & P. R. R. Co.*, 50 Iowa, 338, *Kennedy v. Iowa State Ins. Co.*, 119 Iowa, 29, 91 N. W. 831, and other like cases holding that, when plaintiff shows the fire which caused the injury to his property was set out by one of the company's engines, then the presumption arises that it was caused by the negligence of the company. Proof of the setting out of the fire by the defendant company is strictly analogous to the proof we now require of failure to have a sufficient fence or cattle guard at the place where the animal comes upon the right of way in order to throw upon defendant the burden of proof. We think that the conclusion we have reached is entirely consistent with the rule announced in the fire cases.

For the error in giving the instruction above referred to, which, while it may be in harmony with the *Brentner Case* is inconsistent with the more recent cases on the subject, the judgment of the trial court is reversed.

CHRISTIANSEN v. ILLINOIS CENT. R. CO.

(Supreme Court of Iowa, Nov. 24, 1908.)

[118 N. W. Rep. 387.]

Railroads—Persons Near Cars—Nature of Relation.—Where plaintiff, who had been riding in the caboose of a stock train under a contract requiring him to care for his stock during transportation, left the caboose while the train was standing at a station to inspect the stock, and while doing so was struck and injured by an engine suddenly approaching on a parallel passing track, plaintiff was neither a trespasser nor a mere licensee, but a person rightfully in a place where he might be in danger by reason of the movement of defendant's trains.

Railroads—Injuries to Stockmen—Care Required—Duty to Look.—Where a stockman, while inspecting his stock at an intermediate station, was in a place where he had a right to be, and where he might be in danger by the movement of defendant's trains along a passing track, he having looked in the direction from which the engine by which he was injured approached, was not negligent as a matter of law in not looking again while walking less than two car lengths.

Railroads—Injuries to Stockmen—Contributory Negligence.—Where a stockman testified that he went near a passing track at an intermediate station where he was injured that he might see the numbers on the cars which were placed near the top in order to ascertain which was his stock, he was not conclusively negligent because by going nearer the standing train he would have been out of danger.

Railroads—Persons Near Track—Injuries—Instructions—Evidence.*—Evidence that plaintiff was in plain sight of defendant's engineer and other employees on the engine by which he was injured, and that such employees were in a position to see what was in front of the engine, sufficiently showed that defendant's employees were aware of plaintiff's danger in time to have avoided it by sounding the whistle to justify a charge, that if they saw plaintiff in front of the engine in imminent danger, it was their duty to use ordinary care to avoid injuring him, and that it was for the jury to say whether injury could have been avoided had the employees exercised ordinary care to sound the whistle.

Railroads—Injuries to Stockmen—Railroad's Duty—Lookout.*—Where stockmen traveling on a stock train were required to care for their stock en route, the railroad company was bound to know that the stockmen might rightfully be on or near the track while the train was standing in a railroad yard, and to keep a lookout for them.

*For the authorities in this series on the subject of the care due a stockman riding free in charge of live stock on the carrier's train, see fifth paragraph of second foot-note appended to *Birmingham, etc., Co. v. Sawyer* (Ala.), 29 R. R. R. 779, 52 Am. & Eng. R. Cas., N. S., 799.

Christiansen v. Illinois Cent. R. Co

Appeal from District Court, Mitchell County; C. P. Smith, Judge.

Action to recover damages for personal injuries alleged to have been received by reason of the negligence of the employees in the operation of a train, and without contributory negligence on the part of the plaintiff. There was a verdict for the plaintiff, and, from a judgment thereon, the defendant appeals. Affirmed.

W. S. Kenyon, Thos. D. Healy, and J. M. Dickinson, for appellant.

Charles E. Salisbury and Wm. H. Salisbury, for appellee.

MCCLAIN, J. The facts which the evidence tended to establish, so far as necessary for the determination of the questions presented on this appeal were as follows: Plaintiff was a passenger in the caboose of a stock train which came into the town of Osage from the north, and was thus riding under a contract which required him to feed, water, and take care of his stock being transported in cars in the said train. When the train stopped at Osage, the engine was detached from the south end of the train, and was run along a passing track to the west of the main track on which the train stood to the north end of the train, where it was coupled to the caboose in which plaintiff remained, and this caboose and some of the other cars were pulled to the north for the purpose of incorporating into the train several other cars of stock. After the switching was completed, and the train was made up, and after the engine had been used in handling some other cars in the stockyards to the north, the plaintiff dismounted from the caboose at its south end, and went along southward between the train and the passing track, and near the east rail of the passing track, for the purpose of looking at his stock in the cars. He was engaged in looking for the numbers on the freight cars in the endeavor to locate the cars containing his stock, and had passed southward less than two car lengths when he was struck by the engine coming south along the passing track. Plaintiff testifies that, when he dismounted from the caboose, he looked northward and saw the engine apparently standing still on the main track, and did not look again for the approach of the engine. The allegations of negligence on which the case was submitted to the jury were that defendant's employees in charge of the engine were running it at a high rate of speed without continuously ringing the bell, and without keeping a proper lookout to discover persons in danger of being struck by the engine, and that they were also negligent in failing to sound the whistle after discovering plaintiff in a position of danger. No complaint is made for appellant that the jury was erroneously instructed as to these allegations of negligence, save in one

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respect to be hereafter noticed, nor that there is not sufficient evidence to support the finding by the jury as to the grounds of negligence on which the case was submitted; but it is earnestly contended that there was such proof of contributory negligence as to defeat recovery by plaintiff as a matter of law.

Plaintiff had a right to pass along the track while the train was standing in the station yard for the purpose of inspecting his stock. While doing so he was not a trespasser nor a mere licensee; but he was a person rightfully in the defendant's yards and near its tracks in a place where he might be in danger by reason of the movement of trains and cars along such tracks. In view of the danger incident to being in the yard and near the tracks, it was his duty to exercise such reasonable care and precaution as an ordinary prudent person would exercise under such circumstances for his own safety. This duty involved the necessity of looking out for engines and cars moving along the tracks. He did, in fact, look to the northward and see the engine which afterward by moving along the passing track caused him the injury of which he complains. The real question is this: Was he as a matter of law negligent in not looking again within the short time occupied by him in walking southward for less than two car lengths when he might by thus looking have seen the approaching engine and avoided the injury? We think that when it is conceded that the jury may have found that the engine was run at a speed of 25 or 30 miles an hour along the track at the place where the plaintiff or others similarly situated might rightfully be, and without proper signal by the continuous ringing of the bell being given, the jury might also properly find that plaintiff was not negligent in failing to look again within so short a period of time. One who is on or near a railroad track for a proper purpose cannot be required as a matter of law to be constantly looking; that is, to be looking at every instant of time for the approach of engines and cars. Having advised himself by proper observation of his surroundings and the sources of probable danger, he may proceed with the reasonable belief that the railroad employees will perform their duty as to his safety. Of course, there are duties of care resting upon him as well as upon the employees, but we cannot say as a matter of law just how often he should look for an approaching danger. When he did look, no danger was imminent, and if, after the observation which he did make, he proceeded in a method which would have been safe had the engine been properly operated, he cannot be said to have been conclusively negligent. *Camp v. Chicago G. W. R. Co.*, 124 Iowa, 238, 99 N. W. 735; *Christopherson v. Chicago, M. & St. P. R. Co.*, 135 Iowa, 409, 109 N. W. 1077; *Ward v. Marshalltown, L. P. & R. Co.*, 132 Iowa, 578, 108 N. W. 323; *Adam v. Union El. Co. (Iowa)* 116 N. W. 332. It is said that plaintiff was negligent in being so near the pass-

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ing track that he was in danger from the engine operated on that track when he might by going nearer to the standing train have been out of the field of danger, but he testified that he went near the passing track for the purpose of better seeing the numbers on the cars which were placed near the top, and we do not think he was conclusively negligent in doing so. The cases relied on for appellant are those in which one going along or near railway tracks might as conveniently proceed in a course of safety as in a course involving danger, but if plaintiff, in the proper endeavor to find the cars in which his stock was contained went upon or dangerously near to the passing track, his act was not necessarily and conclusively improper. The question of contributory negligence when one is properly upon or in dangerous proximity to railroad tracks must be determined largely by the circumstances of each case. Many of the authorities cited for appellant relate to the entire failure of one in a place of danger to take any precautions for his own safety, which, as already indicated, does not appear in the case before us.

In one instruction the jury was told that, if defendant's employees saw plaintiff in front of the engine and in imminent danger of being struck by it, then it was their duty to exercise ordinary care and diligence according to the circumstances to avoid injury to the plaintiff, and that it was for the jury to say whether under such circumstances injury to plaintiff would have been avoided had the employees exercised ordinary care and diligence to sound the whistle. It is contended for appellant that there was no evidence tending to show that the employees of defendant did see or become aware of the danger to plaintiff in time to have avoided it by the sounding of the whistle, and that, therefore, it was not proper to instruct the jury as to the duty of defendant's employees to take precautions to warn plaintiff of his danger. But the fact that no witness testifies that any employee of defendant did actually see plaintiff in a position of danger is not conclusive. In view of the evidence showing plaintiff to have been in plain sight of the engineer and other employees on the engine, and that such employees were in position to see what was in front of the engine as it was run along the passing track, it was for the jury to say whether, in fact, they did see plaintiff was in dangerous proximity to the track in time to have given him warning. *Purcell v. Chicago & N. W. R. Co.*, 117 Iowa, 667, 91 N. W. 933; *Johnson v. Chicago, M. & St. P. R. Co.*, 122 Iowa, 556, 98 N. W. 312; *Farrell v. Chicago, R. I. & P. R. Co.*, 123 Iowa, 690, 99 N. W. 578; *Barry v. Burlington, R. & L. Co.*, 119 Iowa, 62, 93 N. W. 68, 95 N. W. 229.

The record does not show that there was any statute or ordinance limiting the rate of speed of trains at the point where plaintiff was injured, but the speed of the train was not sub-

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mitted to the jury as one of the elements of defendant's alleged negligence, nor was negligent speed of the train submitted as having any bearing on the question of plaintiff's contributory negligence. We cannot see as a matter of law that plaintiff's failure to look a second time for an approaching engine after having once looked and seen the engine standing still on the main track some distance north of the caboose was conclusively negligence on his part under the circumstances. As already indicated, he was not bound at his peril to be looking northward for the approaching engine at every instant of time, nor to anticipate that the engine would be run southward on the passing track at the highest possible rate of speed at which it could lawfully be run. The question for the jury was what should a reasonably prudent person have done under the circumstances to avoid danger. It is to be borne in mind that this is not a case where there was no duty on the part of defendant's employees to be on the lookout for persons on the track or in dangerous proximity to it. They were bound to know that at this place persons might rightfully be on or near the track and to keep a lookout for them. *Thomas v. Chicago, M. & St. P. Ry. Co.*, 103 Iowa, 649, 72 N. W. 783, 39 L. R. A. 399.

Finding no error in the record, the judgment is affirmed.

HUTTO v. SEABOARD AIR LINE RY.

(Supreme Court of South Carolina, Nov. 20, 1908.)

[62 S. E. Rep. 835.]

Railroads—Fires—Actions—Nature and Form of Remedy.—A complaint alleging that a locomotive was so negligently operated that it emitted sparks which set fire to a cotton seed house adjacent to the railroad, and that the fire was communicated therefrom to the cotton seed house used by plaintiff, stated an action at common law for negligence, and not under Civ. Code 1902, § 2135, making a railroad liable for damages by fire communicated by its engines or originating on its right of way, except where the property damaged shall have been placed on its right of way unlawfully or without its consent.

Railroads—Fires—Actions—Evidence—Sufficiency.—Evidence, in an action against a railroad company for the destruction by fire of cotton seed stored in a cotton seed house on its right of way, that the cotton seed was in the house with the acquiescence of the railroad company and was awaiting a car for shipment, which the owner had requested and for which he had made a guarantee deposit, and that previous shipments from such house had been made by the owner over the railroad company's line, authorized a finding that the cotton seed was upon the right of way with the railroad company's consent,

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so as not to fall within the exception to Civ. Code 1902, § 2135, making a railroad company liable for damages by fire communicated by its engines or originating on its right of way, except where the property shall have been placed on its right of way unlawfully or without its consent.

Railroads—Fire—Actions—Defenses.*—A person who stored cotton seed in a house erected on a railroad company's right of way under an agreement between it and a third person that such third person should not assign or underlet the premises, and that the railroad company should not be liable for loss by fire, without knowledge, actual or constructive, of such agreement, was not bound thereby.

Railroads—Fires—Evidence—Question for Jury.†—Evidence, in an action against a railroad company for the destruction by fire of cotton seed stored in a house on its right of way, that a train had passed at a speed of 40 miles an hour going upgrade, with many sparks flying, that a stiff wind was blowing toward the seedhouse, and that, when the train had gone about two miles, a seedhouse adjacent to the one in which the seed was stored was discovered to be on fire, which fire extended to plaintiff's seedhouse, and there being no evidence of the existence of any other cause of fire, was sufficient to go to the jury on the question of whether the fire was communicated from the locomotive.

Railroads—Fires—Actions—Presumptions and Burden of Proof.‡—Communication of fire by a locomotive is prima facie evidence of negligence which casts the burden on the railroad company to show that the locomotive was constructed, equipped, and managed with due care.

Appeal from Common Pleas Circuit Court of Orangeburg County; J. C. Klugh, Judge.

Action by J. D. Hutto against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

Moss & Lide, for appellant.

L. K. Sturkie and Raysor & Summers, for respondent.

JONES, J. In this action plaintiff recovered judgment against defendant for \$507.15 as damages for destruction of a lot of

*See extensive note, 8 R. R. R. 42, 31 Am. & Eng. R. Cas., N. S., 42.

†For the authorities in this series on the question whether the fact that a fire was set by a railroad locomotive may be established by circumstantial evidence, see foot-note appended to *Staples v. Boston & M. R. R.* (N. H.), 30 R. R. R. 454, 53 Am. & Eng. R. Cas., N. S., 454.

‡See first foot-note appended to *Southern Ry. Co. v. Thompson* (Ga.), 27 R. R. R. 561, 50 Am. & Eng. R. Cas., N. S., 561; first foot-note appended to *Woodward v. Chicago, etc., Ry. Co.* (C. C. A.), 25 R. R. R. 673, 48 Am. & Eng. R. Cas., N. S., 673.

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cotton seed by fire communicated thereto by one of defendant's locomotive engines.

The first contention presented by defendant's exception to this judgment is whether the court erred in holding that the complaint was under the common law, and not under the statute. Section 2135, Civ. Code 1902. The complaint, after alleging the incorporation of the defendant, that it operated the railroad at the time of the fire, and that plaintiff had the lot of cotton seed stored in a seedhouse "adjacent to defendant's railroad" in the town of Livingston, a station on said railroad, further alleged:

"Fourth. That on or about the 15th day of March, A. D. 1907, one of defendant's locomotives, used for pulling or carrying defendant's through train which passed through the said town of Livingston, going north, shortly after nightfall, on or about the 15th day of March, 1907, at a high rate of speed, in violation of the laws of said town, was so carelessly and negligently managed and operated by the defendant that said locomotive emitted, while passing through said town of Livingston as aforesaid, a large quantity of sparks, which sparks so emitted set fire to a certain cotton seed house adjacent to defendant's railroad, in the county and state aforesaid, and the flames and heat of said cotton seed house while being burned communicated and set fire to the cotton seed house used by the plaintiff, adjacent thereto, in which the plaintiff had stored his cotton seed, as described in paragraph 'Third' herein, and situate in the town of Livingston, in the county and state aforesaid, adjacent to defendant's railway.

"Fifth. That by reason of said fire, caused by the carelessness and negligence of the defendant as aforesaid, the cotton seed house in which the plaintiff had stored his twenty-one tons of cotton seed, as described in paragraph 'Third' of this complaint, the said cotton seed house was totally destroyed and the plaintiff's twenty-one tons of cotton seed totally consumed by said fire, to the damage of plaintiff five hundred and seven and 15-100 dollars, with interest thereon from March 15, 1907, till settlement is made."

The answer of defendant, besides a general denial, alleged a written agreement between defendant and J. F. Hutto, executed October 29, 1900, permitting J. F. Hutto to erect and maintain a seedhouse upon defendant's right of way in Livingston, S. C., for the purpose of storing cotton seed, etc., upon the stipulation of J. F. Hutto that he would not assign or underlet the premises without the written consent of defendant, and it was further stipulated that defendant should not be liable for loss or damage occurring to the building or contents by fire from the engines of defendant, and that plaintiff used said building so erected for storing cotton seed without the authority, knowledge, or consent of defendant.

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There was evidence introduced by defendant showing that said lease was duly executed, and that the said house in which the cotton seed in question was stored was erected by J. F. Hutto under the lease upon defendant's right of way, and that the plaintiff had been using the same for the purpose of storing cotton seed and not for shipment. This lease was not recorded, and there was no evidence that plaintiff was aware of its provisions. Plaintiff testified that he had no knowledge of the lease or its contents; that the said seedhouse was upon defendant's right of way; that for some time it had been in the possession of the Southern Cotton Oil Company; that he had been using the said house for about two years with the permission of the Southern Cotton Oil Company; that he obtained no written consent from the defendant to use the house; that defendant's agent at Livingston knew that he was using the house; that defendant had been furnishing him cars for the shipment of cotton seed stored in said house; and that he was at the time of the fire awaiting the furnishing of a car by defendant for the shipment of cotton seed, having put up money to guarantee the car. At the close of the testimony defendant moved for direction of verdict in its favor on the ground that the complaint was under the statute, and the evidence was conclusive that the property destroyed by fire was upon defendant's right of way without its consent.

Section 2135, Civ. Code 1902, provides that: "Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said railroad in consequence of the act of any of its authorized agents or employees, except in case where property shall have been placed on the right of way of such corporation unlawfully, or without its consent, and shall have insurable interest in the property upon its route for which it may be held responsible and may procure insurance thereon in its own behalf."

Our cases show that it is not necessary to prove negligence in order to recover under the statute. *Thompson v. R. R.*, 24 S. C. 366; *Rogers v. R. R. Co.*, 31 S. C. 378, 9 S. E. 1059; *Gregory v. Layton*, 36 S. C. 93, 15 S. E. 352, 31 Am. St. Rep. 857. The plaintiff declared that the action was based upon negligence and not upon liability under the statute, and looking at the complaint it is clear that such was the intention and that the circuit court was correct in so holding. But assuming that recovery could nevertheless be had upon the pleadings on proof of a case falling within the statute, we think there was no error in refusing to direct a verdict for defendant. There was testimony tending to show that the cotton seed was destroyed by fire communicated by defendant's locomotive, and that the property was upon de-

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defendant's right of way for purposes of shipment over its line, with the knowledge and acquiescence of its agents, and was at the time of the fire awaiting a car for shipment, which plaintiff had requested and for which he had made guarantee deposit of money, and that previous shipments from said house had been made by plaintiff over defendant's line. These were circumstances from which the jury would have the right to infer that the cotton seed was upon defendant's right of way, not unlawfully but with its knowledge and consent, hence the case did not fall within the exception in the statute excusing liability. As stated already, there was no evidence connecting plaintiff with the lease in question or with notice, actual or constructive, of its stipulations, hence he was not bound thereby. This case is distinguishable from *Insurance Co. v. Southern Ry. Co.*, 77 S. C. 467, 58 S. E. 337, relied on by appellant, wherein there was an express stipulation by the owner of the cotton that the railroad company should not be deemed to have consented to the placing of cotton upon its right of way, and that the cotton was at the sole risk of the owner until tendered and accepted for shipment. The first, second, and third exceptions are therefore overruled.

The four remaining exceptions raise the question whether it was error to refuse defendant's motion for nonsuit and to direct a verdict for failure of plaintiff to make out a case of negligence under the common law. We think there was no error. The testimony showed that the said house containing plaintiff's cotton seed was located in the incorporated town of Livingston, that defendant's vestibule No. 84 passed through the town after nightfall on March 15, 1907, at a speed of 40 miles an hour, going upgrade, with many sparks flying rapidly from its locomotive, and a stiff wind blowing from the east across the tracks towards the seedhouse located on the west side, and that by the time the train had gone about two miles from the station the north corner of the seedhouse adjacent to the one in which plaintiff's lot of seed was stored was discovered to be on fire, which fire extended to plaintiff's seedhouse and burned up his seed. There was no evidence of the existence of any other cause of the fire. There was some evidence to go to the jury on the question of whether the fire was communicated from defendant's locomotive, and the verdict under the charge establishes the fact that the fire was so caused.

There is conflict among the authorities in other jurisdictions as to whether the mere communication of fire by a railroad engine is sufficient to raise a presumption of negligence against the company. Many cases are collated in 13 Ency. Law, at pages 498, 499, for the affirmative of the proposition, and at pages 507, 508, for the negative. See, also, note in 15 L. R. A. 40, collating cases on the subject. Our cases sustain the view that proof of loss by fire communicated by a railroad engine is *prima facie*

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evidence of negligence, which casts the burden on the railroad company to show that its engine was constructed, equipped, and managed with due care. In *Brown v. Atlantic, etc., Ry.*, 19 S. C. 56, the court said: "The fact of the injury being proved, the onus was on the company to disprove negligence, which they might do by showing that they had the most improved mechanical contrivances, and that on that day such engines were managed with due care and skill." In *Wilson & Co. v. Atlantic, etc., Ry. Co.*, 16 S. C. 588, the plaintiff offered evidence tending to show the burning of cotton on the platform by sparks communicated by the defendant's engine, and the defendant in that case offered evidence of care in the equipment and management of the engine, but the Supreme Court held that the circuit court committed no error in refusing the defendant's request to charge: "That if the jury find from the evidence that the defendant corporation was provided with the usual improved machinery for protection against fire, and that said machinery was worked by competent and careful engineers, they will find for the defendant." The court held that, while these were facts which would create a very strong presumption in favor of the company, they are not absolutely conclusive on a question of negligence. In the case at bar defendant made no attempt whatever to show due care in the equipment and management of its engine. In *McCready v. R. R.*, 2 Strob. 356, the court held that when the fact of damage by fire of the railroad engine is shown, and the manner in which the fire was communicated appears, the question of negligence is for the jury. The following cases support the principle stated in *Brown v. R. R.*, *supra*; *Hull v. Sacramento, etc., Ry. Co.*, 14 Cal. 387, 73 Am. Dec. 656; *Spaulding v. Chicago, etc., R. R. Co.*, 30 Wis. 110, 11 Am. Rep. 550, *Clemens v. Hannibal, etc., R. R. Co.*, 53 Mo. 366, 14 Am. Rep. 460; *Atchison, etc., R. R. Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362; *Burke v. Louisville, etc., R. R. Co.*, 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618; *Green Bridge, etc., R. R. Co. v. Brinkman*, 64 Md. 52, 20 Atl. 1024, 54 Am. Rep. 757; *Gulf, etc., R. R. Co. v. Benson*, 69 Tex. 407, 5 S. W. 822, 5 Am. St. Rep. 74; *Louisville, etc., R. R. Co. v. Reese*, 85 Ala. 497, 5 South. 283, 7 Am. St. Rep. 66; *Dean v. Chicago, etc., R. R. Co.*, 39 Minn. 413, 40 N. W. 270, 12 Am. Rep. 659; *White v. Chicago, etc., R. R. Co.*, 1 S. D. 326, 47 N. W. 146, 9 L. R. A. 826; *Southern R. R. Co. v. Elliott*, 129 Ga. 705, 59 S. E. 787.

This view is sufficient to dispose of the exceptions, and it is unnecessary to notice whether there was not other circumstances in the case which, when combined, would aid the presumption of negligence, such as the speeding of the train at night through the town with a high wind blowing across the track towards the combustible property near by, and the engine rapidly emitting a large quantity of sparks.

The judgment of the circuit court is affirmed.

LILLARD *et al.* v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Kansas, Nov. 7, 1908.)

[98 Pac. Rep. 213.]

Railroads—Fires—Actions—Instructions—Applicability to Evidence.

—In an action for damage from fires along a railroad right of way, where the evidence showed that three fires had started along the right of way within three-quarters of a mile of each other and about the same time, an instruction was proper that the jury might infer negligence from the occurrence of a series of fires at or about the same time, though there was no direct evidence that they were negligently caused.

Railroads—Fires—Actions—Sufficiency of Evidence.*—In an action for damage from fires along a railroad right of way, the statute making the mere setting out of the fire prima facie evidence of the company's negligence, plaintiff, on proving the fire, could recover without any positive testimony as to defendant's negligence, in the absence of evidence showing that defendant was not negligent.

Trial—Refusal to Charge—Prejudicial Effect.—In an action for damage from fires along defendant's right of way, though an instruction was proper, under the evidence, that the company's negligence might be inferred from the occurrence of a series of fires without direct evidence of negligence, its refusal was not reversible error, where, after instructing as to the effect of the statute making the mere setting out of the fire prima facie evidence of negligence, the court instructed that, after the company had introduced testimony to rebut the presumption of negligence, it was a question of fact for the jury from all the evidence whether the fire was caused by defendant's negligence or was accidental.

New Trial—Grounds—Newly Discovered Evidence.—In an action for damage from fires along a railroad right of way, where defendant's witnesses testified that the spark arrester on its engine was well adapted to the purpose, that plaintiff discovered witnesses after the trial who, though not familiar with the facts of the case, were qualified as experts and would testify that the kind of screen used was insufficient, was not ground for a new trial, as the sufficiency of the appliance was necessarily involved on the trial, and plaintiff was then bound to anticipate and meet the proof, though plaintiff contended that he did not know nor could he find out until the trial the particular kind of screen used.

New Trial—Grounds—Misconduct of Jury.—In an action for damage from fires along a railroad right of way, that two jurors who had experience in running engines talked with the other jurors about their conclusions from their experience was not ground for a new trial,

*See last foot-note appended to preceding case.

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where it did not appear what the conclusions of such jurors were; plaintiff not being shown to have been prejudiced thereby.

Appeal and Error—Harmless Error—Affecting Party Not Entitled to Succeed.—Where the jury found that defendant was not negligent, error in instructions relating to contributory negligence was immaterial.

Error from District Court, Marion County; O. L. Moore, Judge.

Action, by John T. Lillard and others against the Chicago, Rock Island & Pacific Railway Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

W. H. Carpenter, Lillard & Williams, and T. M. Lillard, for plaintiffs in error.

M. A. Low and Paul E. Walker, for defendant in error.

PER CURIAM. John T. Lillard and others sued the Chicago, Rock Island & Pacific Railway Company for damages on account of a fire set out by one of its engines. A jury trial resulted in a verdict for the defendant, and from the judgment based thereon the plaintiffs prosecute error.

Error is assigned on account of the refusal to give this instruction: "You are instructed that this single fire did not of itself prove negligence, but from the occurrence of a series of fires of a similar nature at or about the same time, when an engine in good order and properly handled does not ordinarily start fires, the jury might be justified in inferring negligence, although there is no direct evidence as to wherein the negligence consisted, and that it was unreasonable to expect of the plaintiffs direct evidence of the specific defect in the engine or its management, as these are matters peculiarly within the knowledge of the defendant." There was evidence that three fires were started within a distance of three-quarters of a mile. The instruction asked was therefore pertinent to the facts. Such an instruction was held proper in *Mo. Pac. Ry. Co. v. Kincaid*, 29 Kan. 654. That action was brought before the enactment of the statute making the mere setting out of the fire *prima facie* evidence of negligence. That law has greatly diminished the importance of such an instruction. In the *Kincaid* Case, the plaintiff, having the burden of showing affirmatively that the defendant was negligent, was able to produce no evidence on the subject, except the fact that several fires had been set out by the same engine. It was therefore not only proper, but very essential, that the court should inform the jury that this circumstance alone was sufficient to support an inference of negligence. It was necessary to tell them that there was some evidence of negligence, and there was none except this. In the present case, the plaintiffs had the benefit of the statu-

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tory presumption of negligence, and could have recovered without any positive testimony on their part; and, although the trial court might have given the instruction asked without error, to have done so would have been to have singled out a particular feature of the evidence for comment—to have called the attention of the jury to an inference which they might make if the reasoning suggested appealed to their judgment. The refusal to do so does not justify a reversal in view of the fact that the trial court, after instructing the jury as to the effect of the statute, added: "After the defendant company has introduced testimony on its behalf tending to rebut this presumption of negligence that arises by reason of the alleged communication of the fire, it then becomes and is a question of fact for you to say, from all the evidence, facts, and circumstances of the case, whether the fire complained of resulted from the negligence of the defendant, or whether it was simply an accident incident to the operation of the railroad, and for which the defendant, if that is the case, would not be responsible."

At the trial the defendant produced witnesses, who described the screen in use on the engine in question to prevent the escape of sparks, and testified that it was well adapted to the purpose, and that the engine had been subjected to a suitable inspection. After the trial, the plaintiffs' attorney found persons who were ready to qualify as experts and contradict this testimony so far as it related to what appliances were proper and what examination they should receive. On the basis of this, regarded as newly discovered evidence, he asked a new trial, excusing his failure sooner to produce it or its equivalent by the fact that before the trial he did not know and could not have ascertained what kind of screen was in use on the engine which set the fire, or what inspection had been made thereof. The new witnesses had no knowledge of any of the facts connected with the setting out of the fire. They could only have testified generally concerning their opinions as to the most effectual means of preventing the escape of sparks from an engine. This was a matter almost necessarily involved in the trial, and the plaintiffs were bound to anticipate and be prepared to meet evidence on the subject favorable to the defendant. It is not asserted that the company changed its theory, or in any way misled its opponents. The only claim of surprise is founded upon the contention that the defendant admitted at the trial using an appliance of a kind which the plaintiffs learned afterwards was inefficient and antiquated. We conclude that the showing was not sufficient to compel the granting of a new trial.

A new trial was also asked because two members of the jury, who had had experience in running engines, talked with the other jurors about their conclusions from such experience; but, as it is not shown what their conclusions were, it cannot be said that the plaintiffs were prejudiced thereby.

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Complaint is made of instructions that were given with regard to contributory negligence. The jury, however, found specially that the defendant had not been negligent. As we hold that no error was committed affecting that finding, it follows that any error relating to the matter of contributory negligence was immaterial.

The judgment is affirmed.

ALLEN v. NORTH CAROLINA R. CO.

(Supreme Court of North Carolina, Dec. 2, 1908.)

[62 S. E. Rep. 1079.]

Railroads—Collisions—Injuries to Person on Track—Negligence.—

A train in the nighttime backed along a place used by the public as a common walkway, and struck a pedestrian. There was no light on the end of the car, 15 feet high and 36 feet long, but two men stood in the middle of it with lanterns in their hands hanging by their sides. Held, that whether the lanterns served the same purpose as a light on the end of the car, so as to give warning of the approach of the train, was for the jury,

Railroads—Injuries to Person on Track—Negligence.*—It is negligence for a railroad to back its train in the nighttime along a place used by the public as a common walkway without a light on the end of it, so as to give warning of its approach.

Railroads—Injuries to Person on Track—Contributory Negligence.†—The failure of a railroad, backing its train in the nighttime along a place used by the public as a common walkway, to place a light on the end of the train, so as to give warning of its approach, does not relieve a pedestrian of all obligations to look and listen for trains, when he attempts to walk on or cross the tracks, nor does it absolve him from the consequences of his neglect to take proper precautions.

Appeal from Superior Court, Mecklenburg County; Justice, Judge.

*For the authorities in this series on the subject of the precautions to be observed when kicking, backing, or switching cars at crossings, see second foot-note appended to *Southern Ry. Co. v. Daves* (Va.), 30 R. R. R. 455, 53 Am. & Eng. R. Cas., N. S., 455; first foot-note appended to *Gorton v. Harmon* (Mich.), 30 R. R. R. 204, 53 Am. & Eng. R. Cas., N. S., 204.

†See first foot-note appended to *Smith's Adm'r v. Norfolk & W. Ry. Co.* (Va.), 29 R. R. R. 715, 52 Am. & Eng. R. Cas., N. S., 715; first foot-note appended to *Southern Ry. Co. v. Hansbrough's Adm'r* (Va.), 28 R. R. R. 1, 51 Am. & Eng. R. Cas., N. S., 1; second foot-note appended to *Rogers v. Rio Grande W. Ry. Co.* (Utah), 27 R. R. R. 567, 50 Am. & Eng. R. Cas., N. S., 567; *Harris v. Southern Ry. Co.* (Ga.), 27 R. R. R. 508, 50 Am. & Eng. R. Cas., N. S., 508; *Louisville & N. R. Co. v. Taylor's Adm'r* (Ky.), 27 R. R. R. 228, 50 Am. & Eng. R. Cas., N. S., 228.

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Action by Dora Allen, administratrix of P. H. Allen, deceased, against the North Carolina Railroad Company. From a judgment of nonsuit plaintiff appeals. Reversed, and new trial ordered.

McNinch & Kirkpatrick and *Morrison & Whitlock*, for appellant.

W. B. Rodman, for appellee.

BROWN, J. The evidence tends to prove that the plaintiff's intestate was killed on defendant's track on February 2, 1908, in the city of Charlotte. He was an employee of the Seaboard Air Line, and had left his work to go to his home. The tracks of the Seaboard Air Line and defendant are parallel for some distance, and people habitually walk on the tracks of both roads along where the accident occurred. There is a path between the two roads, which crossed the track of the defendant twice between the two crossings. The scene of the accident was between the two crossings, on a very dark and windy night. A train, operated on defendant's road, consisting of an engine and two box cars, moving backwards, the engine pushing the cars, struck the intestate and killed him. The alleged scene of this accident is on an embankment some 15 feet high, and about 586 feet north of this crossing of the two railroads. The tracks of the defendant and the Seaboard Air Line are both located on this embankment, and 10 feet, 8 inches apart. The steam of the engine was shut off, and the train was moving downgrade at the rate of about 12 miles per hour.

The plaintiff alleged three distinct acts of negligence, to wit, that the defendant operated an engine and train of cars over a portion of its track running through A. street, or if not A. street, then a place used as a common walkway by the public in the city of Charlotte, on a very dark and rainy night, without having a light or other proper signal on the lead or forward car; that it ran the train faster than the law allowed; that it ran the train without ringing the bell, as the law required. We are of opinion that there is error in his honor's ruling in sustaining the motion to nonsuit, and that upon the evidence he should have submitted the case to the jury upon proper issues and instructions. It is in evidence that the car which was on the end of the backing train had no light on the end of it, but that two men were standing in the middle of it with lanterns in their hands hanging by their sides. As the cars, according to the evidence, are about 15 feet in height, from the earth, and near 36 feet in length, we are unable to say whether lanterns so held in the middle of the car could be readily seen by an observant person on the tracks below. Much would depend upon the height at which the lantern was held above the top of the car. We think this is a matter peculiarly for the consideration of the jury as to

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whether a lantern so placed would answer the same purpose as one on the end of the car. It has been repeatedly held by this court that it is negligence in a railroad company to back its trains along a place used by the public as a common walkway, in the nighttime, without a light on the end of the backing train so as to give warning of its approach. It is true, as contended, that such breach of duty does not relieve the individual of all obligation to look and listen for engines and trains, when he attempts to walk on or cross the tracks of the company, nor does it absolve him from the consequences of such negligence. *Cooper v. Railroad*, 140 N. C. 209, 52 S. E. 932, 3 L. R. A. (N. S.) 391; *Heavener v. Railroad*, 141 N. C. 247, 53 S. E. 513. But we find in the record nothing that would warrant a judgment of nonsuit upon the ground of contributory negligence apparent from plaintiff's evidence.

There is also evidence that, although the whistle was blown for a crossing 586 feet from where the intestate was killed, the bell was not rung, and no other signal given of the approach of the train after it passed the crossing. We fail to see how the speed of the train, whether 4 or 12 miles per hour, whether in violation of the city ordinance or not, could have been the proximate cause of the injury under the circumstances of this case, but that may be made clearer upon the next trial.

New trial.

HONOLULU RAPID TRANSIT & LAND COMPANY, *appt.*, v. TERRITORY OF HAWAII, by Charles R. Hemenway,
Attorney General of the Territory of Hawaii.

(Argued and submitted November 6, 1908. Decided November 30, 1908.)

[29 Sup. Ct. Rep. 55.]

Street Railroads—Regulation.—The enforcement of the continuance by a Hawaiian street railway company of a ten-minute schedule on certain of its lines, upon the ground that the public convenience demands such a schedule, is not within the limits of the judicial power, and is totally inconsistent with the power to regulate the management of the street railway in this respect, which is ultimately vested by Haw. Rev. Laws, § 843, and Session Laws 1905, act No. 78, in the executive authorities.

Appeal from the Supreme Court of the Territory of Hawaii to review a decree which affirmed a decree of the Circuit Court of the First Judicial Circuit, in that territory, enjoining a street railway company from reducing its service on certain of its lines. *Reversed.*

See same case below, 18 Haw. 553.

The facts are stated in the opinion.

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Messrs. David L. Withington, A. B. Browne, Alex. Britton, W. R. Castle, and A. Perry, for appellant.

Messrs. Charles R. Hemenway, for appellee.

Mr. Justice Moody delivered the opinion of the court:

The appellant, hereafter called the transit company, was incorporated by a law of the territory of Hawaii. Revised Laws of Hawaii, chap. 66, §§ 835 to 871. The corporation was granted the right to construct and operate a street railway for a term of thirty years in the district of Honolulu. The character of the construction was, in part, expressly prescribed by the statute, and, in some details, left to be determined by the transit company, subject to the approval of the superintendent of public works. Section 841 enacted that—

"The said association . . . shall at all times maintain a sufficient number of cars to be used upon said railway for the carriage of passengers as public convenience may require, and such other cars designed for the carriage of mails, parcels, and goods as they may deem necessary."

It was provided that, after paying from the income certain charges, including a dividend of 8 per cent on the stock, the excess of the income should be divided equally between the territory and the stockholders, and that "the entire plant, operation, books, and accounts . . . shall, from time to time, be subject to the inspection of the superintendent of public works," Section 868. In certain parts of the field of operation a maximum rate of fare was established by the statute, and in certain other parts it was left to the transit company to fix, subject to the approval of the governor. It was provided by § 483, paragraph 4, that—

"The said association . . . shall make reasonable and just regulations with the consent and approval of the governor regarding the maintenance and operation of said railway on and through said streets and roads; and the said association . . . failing to make such rules and regulations, the superintendent of public works, with the approval of the governor, may make them. All rules and regulations may be changed from time to time as the public interests may demand, at the discretion of the governor."

The railway was constructed and its operation was in progress. On certain streets of its line the transit company had been running cars at intervals of ten minutes. It proposed to discontinue this schedule and establish one with somewhat longer intervals, and had applied to the superintendent of public works for permission to lay the switches necessary to put the proposed schedule into convenient operation. Thereupon the territory, on the relation of its attorney general, brought, in one of the circuit courts of the territory, a suit in equity, in which an injunc-

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tion was sought to prevent the company from running the cars in question at less frequent intervals than ten minutes. In the bill it was alleged that the convenience of the public required that the ten-minute schedule should be maintained and continued. The respondent answered, issue was joined by replication, evidence was taken, and the court found as a fact that the public convenience required the maintenance of the ten-minute schedule. An injunction against the change was accordingly granted. Upon appeal to the supreme court of the territory, the judgment of the lower court was affirmed, and findings of fact made, including the finding that the public convenience required the continuance of the ten-minute schedule. The transit company then appealed here, upon the ground, which is well taken, that the amount in controversy was more than \$5,000.

The dispute between the parties is whether the courts of the territory had jurisdiction in equity to issue the injunction. The transit company contends that no such jurisdiction existed, and, in the alternative, that, if there was jurisdiction in the courts over the subject, it could only be exercised by mandamus. We think it unnecessary to consider the latter proposition, and confine ourselves to a consideration of the broad question whether the court had power, by any form of proceedings, thus to regulate and control the operations of the company. The courts below based the right to issue the injunction upon § 841, correctly interpreting that section as imposing the general duty upon the transit company to operate as well as to maintain such cars as the public convenience requires. The section, however, is not a specific direction to keep in force on the streets covered by the order of the court a defined schedule, with cars running at named intervals, and the right of a court to enforce by injunction or mandamus such a schedule need not be considered. But the action of the court below went much farther than this, and farther than is warranted by any decision which has been called to our attention. In the absence of a more specific and well-defined duty than that of running a sufficient number of cars to meet the public convenience, the court, in this case, inquired and determined, as matter of fact, what schedule the public convenience demanded on particular streets, and then, in substance and effect, compelled a compliance with that schedule. And this was done, though, as will be shown, the full power to regulate the management of the railway in this respect was vested by the statute in the executive authorities. In form the order of the court was a mere prohibition against a change of an existing schedule; but its substantial effect was to direct the transit company to operate its cars upon a schedule found to be required by the public convenience. The effect of the order is not changed by the fact that the schedule enforced by the order of the court is that upon which the transit company was then

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running its cars. The order of the court was not founded upon the consideration that the schedule was the one existing, although that was taken into account; but upon the fact that it was the one which the public convenience required. The question to be determined is whether a court, not invested with special authority, nor having the property in its control by receivership, may, solely, by virtue of its general judicial powers, control to such an extent and in such detail the business of a transportation corporation. The question can be resolved by well-settled principles applicable to the subject. At the threshold the distinction between the case at bar and those cases where there is an enforcement of a specific and clearly-defined legal duty must be observed. This distinction was drawn and acted upon in the case of *Northern P. R. Co. v. Washington Territory*, 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283. In that case it appeared that the railroad company was incorporated by an act of Congress, with power to construct and operate a railroad from Lake Superior to Puget sound, with a branch to Portland. The charter directed that the railroad should be constructed "with all the necessary . . . stations." The territory of Washington filed in the territorial court a petition for a mandamus to compel the railroad company to erect and maintain a station at Yakima city, and to stop its trains at that point. The petition alleged, and the jury found, facts which warranted the inference that a station at Yakima city was desirable and necessary for the proper accommodation of traffic. Thereupon a writ of mandamus issued as prayed for, and, upon appeal, the judgment was affirmed by the supreme court of the territory. Upon writ of error this court reversed the judgment. In the opinion of the court, delivered by Mr. Justice Gray, it was said: "A writ of mandamus to compel a railroad corporation to do a particular act in constructing its road or buildings, or in running its trains, can be issued only when there is a specific legal duty on its part to do that act, and clear proof of a breach of that duty." And the charter direction, that the railroad should construct all necessary stations, was described as "but a general expression of what would be otherwise implied by law," and as not to "be construed as imposing any specific duty or as controlling the discretion in these respects of a corporation intrusted with such large discretionary powers upon the more important questions of the course and the termini of its road." (P. 500.) Accordingly it was held that the determination of the directors with regard to the number, place, and size of the station, having regard to the public convenience as well as the pecuniary interests of the corporation, could not be controlled by the courts by writ of mandamus. And see *People ex rel. Linton v. Brooklyn Heights R. Co.*, 172 N. Y. 90, 64 N. E. 788.

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The business conducted by the transit company is not purely private. It is of that class so affected by a public interest that it is subject, within constitutional limits, to the governmental power of regulation. This power of regulation may be exercised to control, among other things, the time of the running of cars. It is a power legislative in its character, and may be exercised directly by the legislature itself. But the legislature may delegate to an administrative body the execution in detail of the legislative power of regulation. *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 393, 394, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 494, 42 L. ed. 243, 251, 17 Sup. Ct. Rep. 896. We need not consider whether that legislative power may be conferred upon the courts of the territory, as it may be upon the courts of a state, so far as the Federal Constitution is concerned. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. —, post, 67, 29 Sup. Ct. Rep. 67. In this case the legislative power of regulation was not intrusted to the courts. On the contrary, it was clearly vested, by § 843, in the governor and the superintendent of public works. By that section the transit company was itself given authority, in the first instance, with the approval of the governor, to make reasonable and just regulations regarding the maintenance and operation of the railway through the streets. The operation of a railway consists very largely in the running of cars, and the right of the transit company, to regulate, in the first instance, the operation of its railway, clearly includes the power to decide upon time schedules. But the company cannot finally determine, as it chooses, the manner of operating its road in respect of the time, speed, and frequency of its cars. Its primary duty is to operate a sufficient number of cars to meet the public convenience. This duty would rest upon the company, even if it were not expressed, as it is, in § 841. If the company itself complies with its duty by just and reasonable regulations of its own, it is enough. If the company fails in the performance of the duty, its performance is secured in the manner pointed out in the latter part of § 843. The superintendent of public works may make, with the approval of the governor, just and reasonable regulations, and they may be changed from time to time, as the public interest may demand, at the discretion of the governor. Moreover, by an amendment of the charter (act 78, Session Laws 1905), the superintendent of public works may prescribe the speed of cars. The precise function, therefore, which was exercised by the courts below, is, by the statute, confided primarily to the transit company, and ultimately to the discretion of the governor and superintendent of public works. The courts have no right to intrude upon this function, and subject the company to a species of regulation which

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the statute does not contemplate. If the courts were held to have the powers which were assumed in this case it would lead to great embarrassment in the operation of the railway, and perhaps to distressing conflict. Can it be that the courts can dictate the frequency of the running of the cars, and the superintendent of public works their speed? If so, the lot of the company is indeed a hard one. The two incidents of operation are not only related, but inseparable. The authority which controls the one must control the other, or operation becomes impossible. Suppose, again, that the courts, upon hearing evidence, should be of opinion that one schedule is required for the public convenience, and the governor and superintendent of public works should be of opinion that another schedule would better subserve that convenience, which order must the company obey? Must it choose between the liability to punishment for contempt for disobeying the order of the court, and the liability to forfeiture of its franchise for failing to obey the order of the governor and superintendent of public works? These and other like situations, which easily might be imagined, are signal illustrations of the importance of the serving the boundaries between the judicial and legislative field, and of the confusion and injury which would follow from the failure to respect those boundaries. Nothing is decided as to the power of the courts to review the action of the superintendent or governor.

In our opinion, the injunction which was issued in this case, constituting in substance a regulation of the operation of the railway, was, in the first place, not within the limits of the judicial power, and, in the second place, totally inconsistent with the power of regulation vested unmistakably by the legislature in the executive authorities.

Decree reversed.

The CHIEF JUSTICE dissents.

THOMPSON v. ABERDEEN & A. R. Co.

(Supreme Court of North Carolina, Nov. 19, 1908.)

[62 S. E. Rep. 883.]

Trial—Nonsuit—Hearing.—On a motion for nonsuit, the evidence must be taken in its most favorable light to plaintiff and with the most favorable inferences the jury would be authorized to draw therefrom.

Railroads—Injuries to Persons on Tracks—Running without Headlight.*—A railroad company is negligent in operating a train at night without a headlight.

Railroads—Injuries to Persons on Tracks—Evidence—Question for Jury.—Evidence, in an action for death, that a train was operated at a high speed, on a dark night, without a headlight, within an incorporated town, without any signals of its approach, was sufficient to go to the jury on the question of whether decedent's death resulted from negligence of the railroad company.

Railroads—Injuries to Persons on or about Tracks—Failure to Keep Lookout.†—Where neither the engineer nor fireman saw a person when he was struck, there was negligence in not keeping a proper lookout, unless they were prevented from seeing by a failure of the railroad company to furnish a headlight.

Railroads—Injuries to Persons on or about Tracks—Actions—Evidence—Admissibility.‡—In an action for the death of a person on a railroad track, evidence that the track was habitually used as a way was erroneously excluded; it being stated that it would be followed by proof that this was well known to the railroad company.

Appeal from Superior Court, Montgomery County.

Action by Richard Thompson, administrator, against the Aberdeen & Ashboro Railroad Company. From a nonsuit, plaintiff appeals. Reversed.

Morehead & Sapp and *C. D. B. Reynolds*, for plaintiff.

W. J. Adams, J. T. Brittain, J. A. Spence, and Adams, Jerome & Armfield, for defendant.

*See foot-note appended to *Southern Ry. Co. v. Bonner* (Ala.), 14 R. R. R. 554, 37 Am. & Eng. R. Cas., N. S., 554; where all the authorities in this series on the subject, preceding it, are collected.

†For the authorities in this series on the subject of the duty to maintain lookouts on trains approaching crossings, see foot-note appended to *Southern Ry. Co. v. Daves* (Va.), 30 R. R. R. 455, 53 Am. & Eng. R. Cas., N. S., 455; first foot-note appended to *Louisville & N. R. Co. v. Gilmore's Adm'r* (Ky.), 30 R. R. R. 412, 53 Am. & Eng. R. Cas., N. S., 412.

‡See section III of note 21 R. R. R. 256, 44 Am. & Eng. R. Cas., N. S., 256; first foot-note appended to *Alabama G. S. R. Co. v. Godfrey* (Ala.), 30 R. R. R. 421, 53 Am. & Eng. R. Cas., N. S., 421; first foot-note appended to *Minot v. Boston & M. R. R.* (N. H.), 27 R. R. R. 512, 50 Am. & Eng. R. Cas., N. S., 512.

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CLARK, C. J. Appeal from a nonsuit in an action for wrongful death. The evidence must be taken in the most favorable light for the appellant and with the most favorable inferences the jury would be authorized to draw from it. *Powell v. Railroad*, 125 N. C. 372, 34 S. E. 530, and cases there cited. If there was any evidence tending to show that the death of the intestate was the result of the negligence of the defendant, it should have been submitted to the jury.

There was evidence that the plaintiff's intestate was seen at the defendant's station at Star about 9 o'clock at night drinking and eating peanuts; that a half hour thereafter a mixed train of the defendant came from the north, running at a high speed—30 or 40 miles an hour—with no headlight; that it was a dark night; that the engine gave no signals, before or after crossing a country road near the corporate limits, nor at a crossing a few hundred yards further north; that about daylight the next morning the deceased was found in a dying condition, 40 yards south of the crossing, in the corporate limits, with his head crushed, between the ends of the cross-ties, his hat torn, cut, and greasy, near him. His clothes were bloody on one side, and blood was on the ground between ends of ties, and there was evidence on his clothes and on the ground near him that he was eating peanuts at the time he was killed or shortly before. His skull was driven in, and there were cuts and bruises on other parts of his body.

The defendant was negligent in operating a train at night without a headlight. *Willis v. Railroad*, 122 N. C. 909, 29 S. E. 941. The evidence was sufficient to authorize a finding that the deceased was killed by the defendant's train. The uncontradicted testimony was that the defendant was operating its train, at a high speed, on a dark night, without a headlight, within the boundaries of an incorporated town, without giving any signals of its approach. The evidence is almost identical with that in *Powell v. Railroad*, 125 N. C. 372, 34 S. E. 530, which was held sufficient to support a verdict for the plaintiff. Besides the authorities cited in that case, *Powell v. Railroad* has itself been cited and approved since in several cases, among them *Hord v. Railroad*, 129 N. C. 307, 40 S. E. 69, *Clegg v. Railroad*, 132 N. C. 294, 43 S. E. 836, and *Butts v. Railroad*, 133 N. C. 83, 45 S. E. 472. There was sufficient evidence to entitle the plaintiff to constitutional right to have it passed on by the jury. As the case goes back, the defendant can, if it chooses, have the circumstances explained by its engineer. If neither the engineer nor fireman saw the man when he was struck, there was negligence (*Arrowwood v. Railroad*, 126 N. C. 629, 36 S. E. 151), in not keeping a proper lookout, unless they were prevented from seeing by the negligence of the defendant in not furnishing a headlight, should the jury find that there was

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no headlight, which, as the evidence now stands, is uncontradicted.

We think it was also error to exclude the evidence offered to prove that the defendant's track within the town limits was habitually used as a walkway, which, counsel stated, would, if admitted, have been followed by proof that this fact was well known to the defendant.

The judgment of nonsuit is set aside.

Reversed.

ST. LOUIS, I. M. & S. RY. CO. v. LAVENDUSKY.

(Supreme Court of Arkansas, Oct. 26, 1908.)

[113 S. W. Rep. 204.]

Railroads—Injury to Pedestrian—Unauthorized Acts—Liability of Company.*—A railroad company is not liable for injury to a pedestrian walking through its yards, caused by a yard master throwing coal from a freight car in violation of company rules; that act being beyond the scope of his employment and not being beneficial to the company.

Railroads—Trespassers on Tracks—Who Are.†—One walking along a path in a railway yard, not a public highway, was a trespasser.

Railroads—Trespassers—Duty of Company.—The rule making railway companies liable for injuries to trespassers caused by failing to exercise ordinary care to avoid injuring them after their perilous situation has been discovered does not apply, where the servant's acts causing the injury are beyond his authority.

Appeal from Circuit Court, Franklin County; Jephtha H. Evans, Judge.

Personal injury action by Stanley Lavendusky, by his next

*See foot-note appended to *Ballard's Adm'x v. Louisville & N. R. Co.* (Ky.), 30 R. R. R. 494, 53 Am. & Eng. R. Cas., N. S., 494; foot-note appended to *Waler v. Great Northern Ry. Co.* (S. Dak.), 30 R. R. R. 775, 53 Am. & Eng. R. Cas., N. S., 775.

For the authorities in this series on the question, what acts are, and are not, within the scope of employment of a railroad employee, see second foot-note appended to *Mills v. Seattle, etc., Ry. Co.* (Wash.), 30 R. R. R. 621, 53 Am. & Eng. R. Cas., N. S., 621; foot-note appended to *Waler v. Great Northern Ry. Co.* (S. Dak.), 30 R. R. R. 775, 53 Am. & Eng. R. Cas., N. S., 775; last foot-note appended to *Daugherty v. Chicago, etc., Ry. Co.* (Iowa), 28 R. R. R. 558, 51 Am. & Eng. R. Cas., N. S., 558; foot-note appended to *Hirst v. Fitchbury, etc., Ry. Co.* (Mass.), 28 R. R. R. 372, 51 Am. & Eng. R. Cas., N. S., 372.

†For the authorities in this series on the question, who are, and are not, trespassers on railroad tracks or premises, see foot-note appended to *Alabama G. So. R. Co. v. Godfrey* (Ala.), 30 R. R. R. 421, 53 Am. & Eng. R. Cas., N. S., 421; first foot-note appended to *Minot v. Boston & M. R. R.* (N. H.), 27 R. R. R. 512, 50 Am. & Eng. R. Cas., N. S., 512.

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friend, Antony Lavendusky, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and remanded for a new trial.

Walter Lavendusky, a lad about nine years old, was walking by the side of appellant's railroad track in its yards at the town of Denning, Ark. While Lavendusky was thus walking, the yard master of appellant threw from one of its freight cars as it passed along the track a large lump of coal, which struck the lad upon his head, severely injuring him. An eyewitness testified that the yard master was looking down towards young Lavendusky when he threw the coal off. It was shown that the switch or yard crew of appellant threw coal off its cars near where one Kelly lived "pretty often," and that this had been done for a year or two. The witness explained that the crew would throw the coal off "sometimes every day, and then again they would check up, and not throw off any for a few days, and then they would go to throwing it off again." It was shown that after the cars were loaded with coal they were taken down into appellant's yard. The cars were under the supervision of appellant's yard master. The coal on the cars did not belong to the yard master, but to the parties to whom it was billed. Neither the yard master, nor any switchman, nor any one connected with the yard service, had any authority to throw coal from the cars. When this was done, it was in direct violation of the rules of the company. It was not done for the benefit of appellant. When Lavendusky was injured, he was in a path along the railroad "where all the people passed." He was about 10 or 15 yards from the public road. These are the undisputed facts, upon which appellee recovered a judgment against appellant for \$2,500, which this appeal seeks to reverse.

Lovick P. Miles, for appellant.

WOOD, J. (after stating the facts as above). It was beyond the scope of the employment of the yard master to throw coal from appellant's car in the manner shown by the evidence. Appellant had not invested him with such authority, either real or apparent. The act was not for the benefit of appellant, and was a tort, for which appellant was not liable. *St. L., I. M. & S. Ry. Co. v. Grant*, 75 Ark. 579, 88 S. W. 580, 1133; *St. L. S. W. Ry. Co. v. Bryant*, 81 Ark. 369, 99 S. W. 693; *Railway Co. v. Bolling*, 59 Ark. 395, 27 S. W. 492.

The evidence does not show that Lavendusky was upon the public highway. It is not shown that the path where he was at the time of his injury was a part of the public highway. He was therefore a trespasser. *Adams v. St. L., I. M. & S. Ry. Co.*, 83 Ark. 300, 103 S. W. 725; *St. L., I. M. & S. Ry. Co. v. Wilkerson*, 46 Ark. 513. The appellant owed him no positive duty

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to exercise ordinary care to protect him from injury. The doctrine that railway companies are liable for injuries to trespassers caused by failing to exercise ordinary care to avoid injuring them after their perilous situation has been discovered can have no application in cases where the servant's acts causing the injuries are beyond the scope of their employment.

The case of *Fletcher v. Baltimore & P. Ry. Co.*, 168 U. S. 135, 18 Sup. Ct. 35, 42 L. Ed. 411, relied upon by appellee, is not in point. *Fletcher*, the plaintiff in error, at the time of his injury was upon a street crossing, where he had the right to be, and where the company owed him the duty to exercise ordinary care to avoid injuring him. Likewise, in the case of *St. L. S. W. Ry. Co. v. Underwood*, 74 Ark. 610, 86 S. W. 804, the party injured was upon the public street. Other reasons, also, distinguished these and other cases, relied upon by counsel for appellee in his oral argument, from the case at bar.

For the reasons expressed, the judgment is reversed, and the cause is remanded for a new trial.

BOULDEN v. LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky, Oct. 23, 1908.)

[112 S. W. Rep. 936.]

Railroads—Persons on Track—Injury—Instructions.—Where, in an action for injuries to a pedestrian struck by a train, the issue was whether he stepped from a path onto the track in front of an approaching train when the train was so close to him that the trainmen could not avoid the accident, the court's charge held not misleading.

Same.—Persons walking along a railroad track must keep out of the way of trains, and cannot complain that the train is run on one track and not on another.

Same.*—Where there was nothing in the conduct of a pedestrian on the path near the railroad track to apprise the trainmen that he was ignorant of the approach of the train, or to impose on them the duty of taking extra precautions for his safety until, without looking back to see if a train was approaching, he suddenly placed himself in peril, there could be no recovery for being struck by the train.

*For the authorities in this series on the question whether those in charge of trains or street cars have the right to act on the assumption that persons seen on or near tracks will avoid danger from trains, see last foot-note appended to *Louisville & N. R. Co. v. Gilmore's Adm'r* (Ky.), 30 R. R. R. 412, 53 Am. & Eng. R. Cas., N. S., 412; first foot-note appended to *Southern Ry. Co. v. Daves* (Va.), 30 R. R. R. 455, 53 Am. & Eng. R. Cas., N. S., 455; *Wade v. Detroit*, etc., R. Co. (Mich.), 29 R. R. R. 200, 52 Am. & Eng. R. Cas., N. S., 200.

Boulden v. Louisville & N. R. Co

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

"Not to be officially reported."

Action by Harry Boulden against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Frederick W. Schmitz, for appellant.

Benjamin D. Warfield and *S. D. Rouse*, for appellee.

HOBSON, J. The right of way of the Louisville & Nashville Railroad Company runs through a populous part of the city of Covington between the bridge over the Ohio river and the station in Covington. It has two tracks on the right of way, which does not run along a street, but runs across the streets. A good many people walk along the right of way, using it as a walkway, instead of following the streets. Harry Boulden, about 6 o'clock October 9, 1906, was walking south along the right of way near the station in a populous part of the city, and when about 25 feet north of Pike street he was struck by an engine, also going south, and severely hurt. He brought this suit to recover for his injuries; and, the case having been submitted to a jury, a verdict was found in favor of the defendant, on which the court entered judgment, and he appeals.

He testifies that he was walking along between the two tracks going southward; that he came to a puddle of water and, to get around the puddle of water, got upon the ends of the ties of the east track, and while walking on these ties was struck and knocked down by the train which came up behind him. The trains going south regularly ran on the west track; but on this occasion that track could not be used, and so the trains going south were using the east track. While this was unusual, it happened often that for some reason or other the trains would be run on the track that was not regularly used for trains going south. The men on the train testified that it was a dark night; that when they came in sight of Boulden he was walking along the path, where he was perfectly safe, and just before they got to him he left the path and got on the end of the ties, so close to the train that it could not be stopped before he was struck. They also showed that proper signals were given of the approach of the train and a lookout was kept. There was proof on behalf of the plaintiff that no signals of the approach of the train were heard, and that the tracks at this point were much used by the people of the city in going to and fro.

The court instructed the jury in substance as follows: (1) That, if the right of way at this point was much used by the public as a passway, it was the duty of the defendant to give reasonable and timely warnings of the approach of the train and

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to keep a lookout for persons on the right of way, and that if this was not done, and by reason of this not being done the plaintiff was injured, they should find for him; but that it was incumbent upon him, in passing along the right of way, to exercise ordinary care for his own safety, and if he failed to do so, and but for this would not have been injured, they should find for the defendant. (2) That the defendant had the right to run its trains on either of the two tracks shown in the proof. (3) That if the defendant was walking between the tracks, and in a position where he was not in danger, the defendant was not required to anticipate that he would put himself in a position of peril, but had the right to assume that he would keep out of danger.

The jury evidently concluded, from all the evidence and from the circumstances shown by the proof, that the plaintiff was in no danger while walking along the path, and that his being hurt was due to his leaving the path and stopping on the end of the ties just in front of the approaching train, when the train was too close to him for those in charge of it to avoid injuring him. Whether this was the fact was the real question in the case, and the jury could not have been misled by the instructions of the court. It is true all the proof showed that the place where the plaintiff was injured was one much used by the public, and, as there was no contrariety of evidence on the subject, the court might not have submitted that matter to the jury; but the plaintiff could not have been injured by the form of the instructions, as under the evidence there was but one way the jury could find as to this matter. The court properly instructed the jury that the defendant had the right to use either track, as otherwise they might have thought it negligent for the defendant to run the train in question on the east track. Persons who walk along a railroad track are under obligations to keep out of the way of trains, and they cannot complain that the train is run on one track and not on another. There was nothing in the plaintiff's conduct to apprise the operatives of the train that he was ignorant of its approach, or to impose upon them the duty of taking extra precautions for his safety, until he, without looking back to see if the train was coming, suddenly placed himself in peril when the train was right upon him.

Judgment affirmed.

INTERNATIONAL & G. N. R. Co. v. VALLEJO.

(Supreme Court of Texas, Nov. 4, 1908.)

[113 S. W. Rep. 4.]

Appeal and Error—Review—Questions of Fact—Verdict.—Where there is any evidence tending to prove a fact essential to a recovery, the issue is for the jury; but whether there is such evidence in the record is a question of law for the Supreme Court.

Railroads—Injury to Person on Track—Negligence.—Where, in an action against a railroad company for injuries to a child run over by its cars, the facts disclosed created no duty on the part of the company to the child, there could be no negligence, and therefore no liability.

Railroads—Injury to Person on Track—Negligence.—While a train, after dark, was moving backward on a side track, the fireman saw a child on the main track, 14 feet distant, going in the opposite direction. The only danger that could exist to the child would arise from his leaving the main track and crossing over to the side track. The child crossed over to the side track and was run over by cars coupled to the front of the engine. It was the duty of the fireman to keep a lookout in the direction the train was moving. Held, that the trainmen as a matter of law owed no duty to the child, and the company was not liable for the injuries sustained.

Evidence—Weight and Sufficiency—Inferences.—An inference can only be drawn from facts.

Railroads—Injuries to Person on Track—Care Required.*—To impose on the crew of a train the duty to watch all children about railroad yards and tracks during the operation of the train is beyond the proper limitation of all correct principles of law.

Error from Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Evaristo Vallejo, by his next friend, against the International & Great Northern Railroad Company. There was a judgment of the Court of Civil Appeals (108 S. W. 1187) affirming a judgment for plaintiff, and defendant brings error. Reversed and rendered.

Ino. M. King and Hicks & Hicks, for plaintiff in error.

Bertrand & Arnold, for defendant in error.

BROWN, J. The appellee was a child three years old. His mother lived in a section house of appellant at Bermuda, a sta-

*For the authorities in this series on the subject of the duty of railroad employees to lookout for trespassing children, see first footnote appended to *Smartwood's Adm'r v. Louisville & N. R. Co.* (Ky.), 29 R. R. R. 332, 52 Am. & Eng. R. Cas., N. S., 332.

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tion between the city of San Antonio and Laredo. At the station there was a side track of considerable length, which was situated on the west side of the main track. The section house was on the east side of the main track. A freight train was on its way to Laredo, and, arriving at Bermuda, took the side track in order to let another freight train pass on the main track. It was after dark, about 8 o'clock. There were some flat cars loaded with gravel standing on the side track, and when the train that took the side track passed in it pushed the flat cars to the south far enough so that the freight train would clear the switch and leave room for the train going to San Antonio to pass. The engine was coupled to the train of flat cars. After the train which was going north passed on the main track, the freight train, which it is charged inflicted the injury upon appellee, moved backwards towards the main track and pulled the flat cars with it down to the point where they stood before the freight train had entered upon the side track. The side track was about 14 feet west of the main track, and as the freight train was passing down on the side track to the north the fireman, who was on the east side of the engine, observed the appellee, a small child dressed in white, walking along the main track. The fireman said, "Halloo, kid!" when the child looked, and then "struck a trot" going toward the section house. The fireman went over to the engineer and told him that he had seen some child, "a little bit of a fellow," on the main track, and when they came back on that track to be careful, as it might be on that track playing, or something to that effect.

The fireman testified that he saw the child as it went down the track until it went out of his sight, and then he said he "could have seen it further." There was an electric light on the engine, which was burning and gave a bright light upon the main track for a considerable distance, and on all the space between the track and the flat cars, to within a few feet of the cars. The fireman spoke to a brakeman, who got on the train at the switch, and asked him if he had seen the child on the track, and the brakeman said that he had not. Fletcher, the fireman, manifested a good deal of concern and anxiety for the child. He said he was not afraid that the child would go close to the cars of the train he was on, but he feared that the child might stop on the way somewhere and get hurt. No one on the train knew the child was hurt until they got to Laredo. After the train left, one of the men at the section house heard a woman crying and the child crying. He went out and found that the mother of the child had it in her arms with one of its feet injured. They took the child to Laredo for treatment. There was no direct evidence as to what place the child was when injured; but the testimony showed that there was blood upon the track at the rear trucks of the second car from the engine

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where the cars were stopped. The mother seems not to have testified, although she took the child from the track. The engineer testified that it was unusual for the fireman, if he saw a person within 12 or 14 feet of the track, to come over and tell him of it. He said that he heard the fireman say, "Hallo, kid!" and the fireman told him about seeing the child. Fletcher, the fireman, testified that it was his duty to keep a lookout in the direction the train was moving, and he did so. There was some conflict in the statements of Fletcher as to the distance the train had moved after he saw the child and before it stopped. The evidence seems to indicate that the train had moved but a short distance, perhaps two cars' length, after he saw the child, before it stopped and cut loose from the flat cars.

If there is any evidence in this case which tends to prove negligence on the part of the employees of the railroad company that caused the injury, then an issue of fact was made, to be decided by a jury, and of which this court has no jurisdiction. Whether there is such evidence in the record is a question of law, which it is the duty of this court to decide. The important question in this case is, what duty did the railroad company owe to the defendant in error, under the facts as they appear in the record? If it be true that the facts disclosed before the jury and presented to us created no duty on the part of the railroad company to the child, then there can be no negligence; and, being no negligence, there can be no liability on the part of the railroad company. When Fletcher, the fireman, saw the child, it was on the main track and 14 feet distant from the moving train, on which Fletcher was. The train was then moving northward and backward, and the child was on the main track going in the opposite direction. While upon the main track the child was in no present danger from the moving train. The only danger that could be said to exist was that he might change his course and, leaving the main track, cross over to the side track and come in contact with the train. But this danger depended upon the action of the child, and could not be guarded against by the employees by any means consistent with the performance of their duties in the operation of the train. They could exert no control over the child's action, and, situated as he and the train were in relation to each other, there was no danger that the child would be injured by the train's movements so long as he continued in the direction he was going.

The question then arises, what should the employees of the railroad company have done under the circumstances to guard that little child against injury? It is manifest that there was nothing for them to do, but what they did do—leave the child in its then secure condition and attend to their duties, or stop the train and send some one to carry the boy to his mother. Would any one contend that it was the duty of the railroad

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company to cease the operation of its train in order to perform the duties of nurse? If there had been probability that by the continued movement of the train injury would be inflicted on the boy, the duty to stop the train would have arisen; but no such result was indicated by the facts. We conclude that negligence cannot be predicated upon the fact that the fireman saw the child upon the main track after night, although he knew it was liable to get into danger, because such condition of things imposed no obligation upon the railroad company, and therefore there was no act to be performed by its employees, the failure to do which renders the company liable for the results.

There is testimony which tends to show that the fireman was mistaken as to the distance the child had traveled when it went out of his sight, and the evidence shows that he did in fact leave the main track, and cross over to the side track, and come in contact with the moving train, and thereby received the injury; but these facts are not sufficient in themselves to create a liability on the part of the railroad company. The fireman testified that it was his duty to keep a lookout in the direction the train was moving, and this is manifestly true, because he would be called upon to inform the engineer of signals which might be given by the train crew in the movements of the freight train. Therefore it was not his duty to keep the lookout to the rear of the moving train. *Green v. Railroad (Ky.)* 78 S. W. 439; *Pedigo's Adm'r v. Railroad (Ky.)* 68 S. W. 463. Since it was not the duty of the fireman to watch in the rear, the fact that the child did pass over at a place where he could have been seen does not justify an inference that the fireman saw him as he passed from one track to the other. This is the ground upon which the Court of Civil Appeals concludes that the jury rested their verdict. It is perhaps the most plausible theory that can be advanced in support of their finding; but in our opinion it is absolutely without probative force upon the question whether the fireman saw the child or not. An inference can only be drawn from facts; and, there being no facts upon which to base it, such an inference or conjecture is wholly unsupported.

The cases cited by the appellee are not in point on this question. In the case of *M., K. & T. Ry. Co. v. Nesbit* (Tex. Civ. App.) 97 S. W. 825, the child was going in the same direction as the train, and was on a road which crossed the railroad track. He was in plain view of the engineer. It was evident to all bystanders that the child intended to cross the track. It was the duty of the engineer to keep a lookout, and if he had done so he could have seen the boy. The facts distinguish that case from this. It is unnecessary for us to comment upon the other cases cited. Their facts are so dissimilar to this case that their want of applicability here is manifest. There is a marked difference between the duty of the crew in starting a standing train, about

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which children have been loitering, and the continued operation of a train already in motion, when no child has been observed to be near to it. To impose upon the crew of a train the duty to watch all children that may be about the railroad yards and tracks during the operation of the trains would be going beyond any adjudicated case which has been brought to our notice, and beyond the proper limitation of all correct and just principles of law.

We are of opinion that there is no evidence upon which to base the verdict in this case, and that the trial court should have instructed the jury to return a verdict for the defendant. The Court of Civil Appeals erred in affirming the judgment of the district court, for which error judgments of the district court and Court of Civil Appeals are reversed, and judgment is here rendered for the plaintiff in error.

ARKANSAS MIDLAND RY. CO. v. WORDEN.

(Supreme Court of Arkansas, April 5, 1909.)

[119 S. W. Rep. 828.]

Master and Servant—Assumption of Risk—Obvious Risks.*—A mature and experienced employee assumes all of the obvious risks of his employment, including the risk of injury from the kind of machinery then openly used, as well as from the methods of operation then observable.

Master and Servant—Injuries—Assumption of Risk—Inexperienced and Youthful Employee—Obvious Dangers.†—An inexperienced or youthful employee does not assume risks, even though obvious, which he does not fully realize or appreciate, unless he has been instructed

*For the authorities in this series on the question whether an employee assumes the risks from defective appliances, unsafe work place, or other dangerous conditions, of the existence of which he has knowledge, see second foot-note of *Clippard v. St. Louis Transit Co.* (Mo.), 23 R. R. R. 107, 46 Am. & Eng. R. Cas., N. S., 107, where all those preceding it are collected; last foot-note of *Langly v. Bird & Wells Lumber Co.* (Wis.), 31 R. R. R. 242, 54 Am. & Eng. R. Cas., N. S., 242; second foot-note of *Galloway v. Chicago, etc., Ry. Co.* (Ill.), 30 R. R. R. 781, 53 Am. & Eng. R. Cas., N. S., 781; foot-note of *Chicago, etc., Ry. Co. v. Donovan* (C. C. A.), 30 R. R. R. 724, 53 Am. & Eng. R. Cas., N. S., 724; last foot-note of *Eastern & Western Lumber Co. v. Rayley* (C. C. A.), 29 R. R. R. 590, 52 Am. & Eng. R. Cas., N. S., 590.

†For the authorities in this series on the subject of the duty of the master to instruct and warn his employees, see *Sawyer v. Norfolk & S. R. Co.* (N. Car.), 25 R. R. R. 530, 48 Am. & Eng. R. Cas., N. S., 530 (alighting from moving train upon pile of gravel, danger of was obvious; and railroad was not negligent in failing to warn brakeman of such danger); *Germanus v. Lehigh Valley R. Co.* (N. J.), 27 R. R.

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and warned thereof; it being the master's duty to instruct and warn him of patent, as well as latent, dangers.

Master and Servant—Injuries—Actions—Jury Question—Assumption of Risk.—In an action for the death of a 20 year old engine hostler by being caught under an engine, which was derailed because an unlighted switch was thrown so as to disconnect it with the other track, whether the danger of operating the switch without switch lights was obvious to such an inexperienced employee, so as to make it an assumed risk, held a jury question.

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

Action by F. G. Worden against the Arkansas Midland Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

E. B. Kinsworthy and Bridges, Wooldridge & Gentt, for appellant.

H. A. Parker, for appellee.

McCULLOCH, C. J. This is an action instituted against the Arkansas Midland Railway Company by F. G. Worden as administrator of the estate of his deceased son, Beecher Worden, to recover damages sustained by reason of the latter's death, which is alleged to have been caused by the negligence of the

R. 622, 50 Am. & Eng. R. Cas., N. S., 622 (duty of foreman to give customary warning of approach of train to section hand is a non-assignable one); *Chicago & E. I. R. Co. v. Kimmel* (Ill.), 21 R. R. R. 384, 44 Am. & Eng. R. Cas., N. S., 384 (duty of foreman to use reasonable diligence to warn laborers on certain cars of danger in consequence of others approaching, sufficiency of evidence of); *Richards v. Sloss—Sheffield Steel & Iron Co.* (Ala.), 21 R. R. R. 36, 44 Am. & Eng. R. Cas., N. S., 36 (duty of master to instruct employee as to how to perform his work); *Savage v. Rhode Island Co.* (R. I.), 25 R. R. R. 206, 48 Am. & Eng. R. Cas., N. S., 206 (duty to warn street car conductor of non-obvious danger from pole near track); *Graham v. Detroit, etc., Ry. Co.* (Mich.), 29 R. R. R. 116, 52 Am. & Eng. R. Cas., N. S., 116 (duty to warn managers of work train, sent out to repair road rendered unsafe by a storm, before the storm has spent its force, as to the location of specific washouts and defects in the road over which the train will run); *Precodnick v. Leigh Valley R. Co.* (N. J.), 26 R. R. R. 426, 49 Am. & Eng. R. Cas., N. S., 426 (duty to warn track laborer of approach of train); *Graham v. Detroit, etc., Ry. Co.* (Mich.), 29 R. R. R. 116, 52 Am. & Eng. R. Cas., N. S., 116 (duty to warn track repairer riding on work train, before the storm has spent its force, of the location of specific washouts on the road is not an absolute nondelegable duty); *Chicago & E. I. R. Co. v. Kimmel*, 21 R. R. R. 384, 44 Am. & Eng. R. Cas., N. S., 384 (failure of foreman to warn employee on car of danger arising in consequence of other cars approaching); *Edington v. St. Louis & S. F. R. Co.* (Md.), 24 R. R. R. 707, 47 Am. & Eng. R. Cas., N. S., 707 (negligence in failing to notify switch crew that train would be moved by road engine, instead of by switch engine); *Kennedy v. Kansas City, etc., R. Co.* (Mo.), 21 R. R. R. 818, 44 Am. & Eng. R. Cas., N. S., 818 (negligence

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railway company. The elements of damages claimed are bodily pain and suffering endured by decedent between the time of his injury and his death, and the expected contributions thereafter to his father. Beecher Worden was between 20 and 21 years of age at the time of his death, and was employed by the railway company as engine hostler; his specific duties being to take engines to and from the depot and roundhouse at Helena, Ark., one of the termini of the road. He received the injuries about 9:30 o'clock on Saturday night, December 28, 1906, and died the following Monday morning. His engine left the rails, fell down an embankment on its side, and pinned him underneath, where he was badly scalded by escaping steam and hot water, and remained in that helpless condition for about five hours before he could be extricated by raising the engine. He suffered pain from the moment of his injury to the time of his death, so intense that the efforts of skilled medical attendants failed to alleviate it. All the witnesses who saw him testify that his suffering was intense, and that all the time he lay beneath the overturned engine he begged most piteously to be killed, so as to end his suffering. The trial jury returned a verdict in favor of the plaintiff, fixing the damages at \$4,000 for the pain and suffering, and \$1,300 for the expected contributions to the father.

The young man was in the discharge of his customary duties, taking the engine from the depot to the roundhouse, and was

of foreman of switching crew, in failing to give warning to engineer, was cause of injury to brakeman); *Denver & G. R. Co. v. Burchard* (Colo.), 21 R. R. R. 361, 44 Am. & Eng. R. Cas., N. S., 361 (duty to warn trainmen as to location of mail crane where it was not unnecessarily near track); *Wilson v. New York, etc., R. Co.* (R. I.), 29 R. R. R. 135, 52 Am. & Eng. R. Cas., N. S., 135 (post too near track, duty of railroad to notify its employees of the danger from); *Conniff v. Louisville, etc., Ry. Co.* (Ky.), 26 R. R. R. 465, 49 Am. & Eng. R. Cas., N. S., 465 (duty to give warning to flagman, while he was engaged in his duties connected with switch lamps at street crossing); *Denver & R. G. R. Co. v. Sporleder* (Colo.), 26 R. R. R. 404, 49 Am. & Eng. R. Cas., N. S., 404 (warning of danger, duty of master to give); note, 5 R. R. R. 441, 28 Am. & Eng. R. Cas., N. S., 441 (duty of railroad companies to prescribe rules for the protection of their employees); note, 19 Am. & Eng. R. Cas., N. S., 506 (duty to instruct and warn inexperienced servants); note 14 Am. & Eng. R. Cas., N. S., 381 (duty to give warning of overhead structures); note, 19 Am. & Eng. R. Cas., N. S., 6 (duty of master to warn servant of approaching danger), *Northern Pac. Ry. Co. v. Mix* (C. C. A.), 6 R. R. R. 739, 29 Am. & Eng. R. Cas., N. S., 739 (care required of master to notify trainmen in order to prevent collisions); *Louisville & N. R. Co. v. Lowe* (Ky.), 1 R. R. R. 363, 24 Am. & Eng. R. Cas., N. S., 363 (duty to give signals to warn car inspector of approach of engine); *Miller v. Boston & Maine R. R.* (N. H.), 17 R. R. R. 564, 40 Am. & Eng. R. Cas., N. S., 564 (duty to instruct brakeman as to location and height of overhead bridges); *Proffitt v. Missouri, K. & I. Ry. Co.* (Tex.), 5 R. R. R. 196, 28 Am. & Eng. R. Cas., N. S., 196 (duty to warn and instruct servant), *Tennessee Coal, Iron & R. Co. v. Jarrett* (Tenn.), 13 R. R. R. 589, 36 Am. & Eng. R. Cas., N. S., 589 (duty to warn and instruct servant,

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backing it along the usual route over the main track, when it was derailed and overturned at or near a switch. The switch in question is what the witnesses term a "three-throw" or "stub" switch; the two rails of the main track being moved by the use of the lever to and from the three connected tracks, so as to allow trains to pass over either of the tracks as desired. The two movable rails are called the stub rails. When an engine approaches the switch from the stub rail end of the track, it will of course pass onto the one of the tracks to which the stub rails are at the time connected; but, if it approaches from the other direction, and the stub rails are connected with another of the three tracks, then a derailment of the engine necessarily results, for it runs off the ends of the disconnected rails. Worden's engine was backing along one of the parallel tracks, approaching the stub rails, and, as before stated, it was derailed at or near the switch. There is some conflict in the testimony as to the precise point at which the derailment occurred; but there is sufficient evidence to warrant the finding that it occurred at the switch, and ran a short distance on the ties before it overturned down the embankment. There was evidence to the effect that the switch was thrown so as to disconnect the stub rail, and the jury were justified in finding that this was true, and that the engine and tender were derailed on that account. There was no

instructions as to effect of servants' knowledge of duties; and duty to warn and instruct servant ordered to do dangerous work outside scope of his regular duties); *St. Louis S. Ry. Co. v. Spivey* (Tex.), 10 R. R. R. 697, 33 Am. & Eng. R. Cas., N. S., 697 (duty to warn employee of danger of riding around yard, where he had no duties connected with cars, on car steps); *Weed v. Chicago, etc., Ry. Co.* (Neb.), 13 R. R. R. 797, 36 Am. & Eng. R. Cas., N. S., 797 (duty to warn experienced employee of dangers incident to business); *Crane v. Chicago, etc., R. Co.* (Iowa), 14 R. R. R. 842, 37 Am. & Eng. R. Cas., N. S., 842 (duty to warn servant as to hidden dangers from use of certain appliances); *Gay's Adm'r v. Southern Ry. Co.* (Va.), 8 R. R. R. 537, 31 Am. & Eng. R. Cas., N. S., 537; *Stewart v. Texas & P. Ry. Co.* (La.), 13 R. R. R. 158, 36 Am. & Eng. R. Cas., N. S., 158; *Tennessee, etc., R. Co. v. Jarrett* (Tenn.), 13 R. R. R. 589, 36 Am. & Eng. R. Cas., N. S., 589 (duty to warn servant's of perils of employment); *Clark v. Missouri, etc., R. Co.* (Mo.), 10 R. R. R. 328, 33 Am. & Eng. R. Cas., N. S., 328 (failure of master to warn section hand of vicious nature of steer, which had escaped from train wreck, was not the proximate cause of injury sustained by falling into pit in evading the animal's charge); *Woods v. Northern Pac. Ry. Co.* (Wash.), 15 R. R. R. 365, 38 Am. & Eng. R. Cas., N. S., 365 (railroad is not bound to warn its employees of obvious differences in construction of foreign cars); *Shuster v. Philadelphia, etc., R. Co.* (Del.), 19 R. R. R. 6, 42 Am. & Eng. R. Cas., N. S., 6 (in action for death of car inspector, it appeared that his railroad company was not guilty of actionable negligence in failing to give further notice of the crippled car which had been placed in train, then that given by placing repair shop card on the car); *Driver's Adm'r v. Southern Ry. Co.* (Va.), 18 R. R. R. 11, 41 Am. & Eng. R. Cas., N. S., 11 (negligence in failing to give a train in advance special warning orders of a train

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lock on the switch, nor any lights of any kind, and this is the basis of plaintiff's charge of negligence against the railway company in failing to exercise ordinary care to provide a reasonably safe place for its servants to work in. The evidence does not disclose how the switch came to be thrown—whether by accident or design—but it is manifest that if signal lights had been displayed at the switch, Worden and his helper, who was on the engine with him, would have been warned of the disconnected track which they were approaching, and could have averted the injury. Several witnesses testified that it was dangerous not to display a light at switches, and the evidence abundantly establishes the fact that the defendant was guilty of negligence in this respect, and that this negligence was the proximate cause of Worden's injury and death. The defendant pleaded in its answer, and attempted to prove, contributory negligence on the part of Worden in running the engine at too great speed, and in failing to stop the engine after it became derailed and was running on the ties. This issue was submitted to the jury, and the finding, which is sustained by ample evidence, was against the defendant. The testimony shows, by what appears to us to be a clear preponderance, that the engine was moving at the ordinary and customary rate of speed for the yard limits, and that as soon

following, which was dangerously made up, is not shown where it is not proved to have the railroad's duty to notify such trains, and the dangerous make up was not known by it); *Crane v. Chicago, etc., R. Co. (Iowa)*, 14 R. R. R. 842, 37 Am. & Eng. R. Cas., N. S., 842 (negligence in failing to warn fireman of an obstructing car was a question for jury); *Bence v. New York, etc., R. R. (Mass.)*, 3 R. R. R. 295, 26 Am. & Eng. R. Cas., N. S., 295 (not required to warn experienced employee of danger of being struck by car in crowded yard); *Bain v. Northern Pac. Ry. Co. (Wis.)*, 12 R. R. R. 31, 35 Am. & Eng. R. Cas., N. S., 31 (negligence in failing to provide for warnings of the movements of trains, for the protection of employees working near track); *Chicago, etc., Ry. Co. v. Riley (C. C. A.)*, 20 R. R. R. 403, 43 Am. & Eng. R. Cas., N. S., 403 (negligence in failing to warn switchman of danger of switch handle coming in contact with car steps); *Illinois Cent. R. Co. v. Jones' Adm'r (Ky.)*, 12 R. R. R. 372, 35 Am. & Eng. R. Cas., N. S., 372 (negligence in suddenly starting train without warning while brakeman was uncoupling); *Bowers v. Star Logging & Lumber Co. (Ore.)*, 3 R. R. R. 300, 26 Am. & Eng. R. Cas., N. S., 300 (sufficiency of evidence to sustain finding that defendant was negligent for having failed to properly instruct and warn employee injured by reason of brake on logging train becoming loose); *Western Ry. v. Russell (Ala.)*, 20 R. R. R. 225, 43 Am. & Eng. R. Cas., N. S., 225 (duty to warn trainmen of dangerous condition of track); *Louisville & N. R. Co. v. Miller (C. C. A.)*, 19 Am. & Eng. R. Cas., N. S., 500 (duty to instruct inexperienced servant, and duty to instruct servant is a nonassignable one); *Daly v. Kiel (La.)*, 22 Am. & Eng. R. Cas., N. S., 320 (duty to warn servant working in dangerous place); *Indiana, etc., R. Co. v. Bundy (Ind.)*, 14 Am. & Eng. R. Cas., N. S., 660; *Mitchell v. Boston, etc., R. Co. (N. H.)*, 4 Am. & Eng. R. Cas., N. S., 256 (negligence of master in not giving information to servant).

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as it left the rails Worden made every effort to check the speed and bring it to a standstill.

The most serious question in the case is whether the danger arising from using an unlocked switch, and from the absence of a signal light on the switch, was, notwithstanding the negligence of the defendant in permitting the switch to be in that condition, one of the ordinary hazards of the service, the risks of which the servant assumed when he accepted the employment. Worden had been engaged in this particular work about one month, and had been accustomed, during that time, to taking three or four engines each night along the track by this switch. The evidence shows conclusively that no light had been maintained at the switch since Worden took service to do this work; and the question therefore arises whether the absence of the signal light was an obvious danger to employees on the passing trains, such as they were bound to take notice of, and, if so, whether they assumed the risk thereof. For when an employee takes service with his employer, he impliedly agrees to assume all the obvious risks of the business, including the risk of injury from the kind of machinery then openly used, as well as the method of operating the business then openly observed. *C., O. & G. Ry. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837; *Southern Cotton Oil Co. v. Spotts*, 77 Ark. 458, 92 S. W. 249; *C., O. & G. Ry. Co. v. Thompson*, 82 Ark. 11, 100 S. W. 83; *Roony v. Small & Day Cordage Co.*, 161 Mass. 153, 36 N. E. 789. This is the rule which applies to an employee of mature years and experience in the particular work or business, for there is no duty on the part of the master to warn an experienced servant of obvious dangers, for they are among the ordinary incidents of the service, and he is bound to take notice of these, and must be presumed to have realized and appreciated such danger. *L. & A. Ry. Co. v. Miles*, 82 Ark. 534, 103 S. W. 158, 11 L. R. A. (N. S.) 720. But the rule is different as to a servant who, by reason of youth or inexperience in the particular work, does not fully realize and appreciate the danger. In that case it is the duty of the master to give proper instructions, and to warn the inexperienced servant of patent, as well as latent, dangers (*Ford v. Bodcaw Lbr. Co.*, 73 Ark. 49, 83 S. W. 346); and, before the inexperienced servant can be presumed to have realized the danger and assumed the risk, it must be shown that he was instructed and warned of it (*Davis v. Ry. Co.*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283; *Arkadelphia Lumber Co. v. Whitted*, 81 Ark. 247, 98 S. W. 697; *Western Coal & Mining Co. v. Burns*, 84 Ark. 74, 104 S. W. 535; 1 Labatt on Master & Servant, § 291; *Kehler v. Schwenk*, 151 Pa. 505, 25 Atl. 130, 31 Am. St. Rep. 777; *Wolski v. Knapp, Stout & Co.*, 90 Wis. 178, 63 N. W. 87).

Chief Justice Cockrill, speaking for the court in *Davis v. Ry. Co.*, *supra*, said: "But service about the unblocked rails was at-

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tended with danger, and the knowledge of the fact that the rails were unblocked did not necessarily imply knowledge of the attendant danger. Knowledge of the danger was itself a question of fact; and, if the jury believed that the deceased, by reason of his youth and inexperience, did not know of or appreciate the danger incident to service about the unblocked rails, and that the company had exposed him to the danger without warning him of it, they should have found that the risk was not one he had assumed by entering the service." Mr. Labatt says this on the subject, in the section just cited: "In the case of an adult the servant's inability to recover for injuries resulting from ordinary risks is declared in terms which are indicative of the fact that his comprehension of those risks is presumed in the absence of evidence which justifies the opposite conclusion. In the case of a minor, on the other hand, the defense of an assumption of ordinary risks is viewed as one which is merely conditional upon the production of specific and positive evidence going to show that the risk in question was, as a matter of fact, comprehended. In short, where a minor is concerned, ordinary risks are, for evidential purposes, always treated at the outset of the inquiry as extraordinary, and the burden of establishing the servant's comprehension of the particular risk is cast upon the employer." And again the same learned author says: "It is manifest that the inquiry whether a minor servant has assumed in a particular instance the ordinary risks of an employment always resolves itself into an examination of the weight of the evidence which tends to establish or negative the inference that he understood it."

Now the evidence in the present case shows that Worden was a minor, with but little experience in the particular work in which he was engaged. There is no evidence that he was ever instructed in the performance of his duties, or that he was ever warned as to the danger of passing along at night by switches without signal lights on them. Of course the absence of the lights was obvious and he knew of that, because he passed along there with engines every night for a month. But was the danger therefrom an obvious one to an inexperienced person? Can we say, as a matter of law, that, without instruction or warning on the subject, Beecher Worden was aware of the danger and appreciated it? For unless he did so, he did not assume the risk as a part of his contract of service. Upon the whole we are of the opinion that this was a question of fact for the determination of the jury, and that there was evidence sufficient to warrant its submission. The instructions of the court on this subject were in accord with these views and we discover no error in them.

Other errors are assigned, but none of the assignments can in our opinion be sustained, and there is nothing else of sufficient importance to call for discussion of them here.

Judgment affirmed.

COLORADO MIDLAND RY. CO. v. BRADY.

(Supreme Court of Colorado, April 6, 1908. Rehearing Denied April 5, 1909.)

[101 Pac. Rep. 62.]

Master and Servant—Injuries to Servant—Railroads—Safety of Place of Work—Customary Methods.*—In an action for injury to a switchman while coupling cars on an open trestle, it is no defense that other roads used the same kind of trestles if the place was not reasonably safe.

Master and Servant—Injury to Servant—Railroads—Safety of Place of Work—Jury Question.—Under the evidence in an action against a railway company, for injury to a switchman while coupling cars on an open trestle, held a jury question whether the company negligently failed to furnish a reasonably safe place of work.

Negligence—Jury Questions.—Negligence in a particular case is generally a matter for the jury to determine, and it is always so when the measure of duty is ordinary and reasonable care; and even though the facts are not undisputed, but are such that different minds might honestly draw different conclusions from them, the case must be left to the jury.

Trial—Questions of Law—Undisputed Facts.—Where the facts are not disputed, and there can be but one opinion as to their effect, the question is one of law.

Master and Servant—Injury to Servant—Assumption of Risk—Question for Jury.—In an action for injury to a switchman while coupling cars on an open trestle, held, under the evidence, a jury question whether plaintiff should have known that that part of the trestle was unplanked and assumed the risk of injury.

Master and Servant—Injury to Servant—Contributory Negligence—Jury Question.—Whether a railway switchman injured while coupling cars on an open trestle was guilty of contributory negligence held, under the evidence, a jury question.

Negligence—Jury Questions.—Where the existence of negligence or contributory negligence is uncertain, the question is one of fact for the jury, regardless of whether the uncertainty arises from conflict of testimony, or because of facts being undisputed, fair-minded men will honestly draw different conclusions from them.

Master and Servant—Injury to Employee—Contributory Negligence—Acts in Emergencies.†—Error of judgment cannot be imputed to an

*See third foot-note appended to *Wilson v. New York, etc., R. Co.* (R. I.), 29 R. R. R. 135, 52 Am. & Eng. R. Cas., N. S., 135.

†See seventh head-note of *McFeat v. Philadelphia, etc., R. Co.* (Del.), 30 R. R. R. 254, 53 Am. & Eng. R. Cas., N. S., 254; first foot-note appended to *Davis v. Chicago, etc., Ry. Co.* (C. C. A.), 30 R. R. R. 183, 53 Am. & Eng. R. Cas., N. S., 183; last foot-note appended to *Smith's Adm'r v. Norfolk & W. Ry. Co.* (Va.), 29 R. R. R. 715, 52 Am. & Eng. R. Cas., N. S., 715.

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employee as contributory negligence in attempting to avoid imminent peril arising from employer's negligence.

Trial—Instructions—Refusal—Matters Covered.—Refusal of instructions is not error where they are covered by those given.

Master and Servant—Injury to Servant—Negligence—Evidence.—Evidence in an action for injury to a railway switchman while coupling cars on an open trestle held to sustain a finding of negligence of the company.

Appeal from District Court, El Paso County; Louis W. Cunningham, Judge.

Action by John Brady against the Colorado Midland Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Rogers, Cuthbert & Ellis and *Lewis B. Johnson*, for appellant.

Thos. J. O'Donnell, John M. Harnan, and Dan B. Carey, for appellee.

STEELE, C. J. The plaintiff, while engaged in the service of the defendant as a switchman, on the 18th day of July, 1899, received an injury which necessitated the amputation of his right leg below the knee. The testimony shows that, at the time plaintiff was injured, he was engaged in attempting to couple two cars loaded with coal on the coal trestle of the defendant in its yards at Colorado City; that the trestle is elevated about 10 feet above the ground; that that portion of the trestle track in front of the coal bins is planked, and the remaining portion, about two-thirds of the length, is unplanked; that one of the cars which plaintiff was attempting to couple was attached to a train consisting of a switch engine and several cars of coal which were at the time being backed upon the trestle; that plaintiff failed in his first attempt to make the coupling, owing to a difference in the height of the drawbars; that, while engaged in attempting to make the coupling, the train of cars was moving slowly along, and plaintiff walked along the trestle in front of the foremost car, and that, while so walking and attempting to make the coupling, he stepped into a space between the planking and the first tie beyond, and fell; that his right leg was caught in the space; and that the cars, which were still moving, ran over his leg and crushed it. Other facts material to the decision will be stated in the course of the opinion. The plaintiff claims that the defendant was negligent in not having the trestle track planked throughout its entire length. The defendant denies that it was negligent in not having the trestle so planked, and insists that the plaintiff assumed the risk of receiving an injury such as he sustained, because he knew, or by the exercise of ordinary care should have known, that the trestle was unplanked, and also that,

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in the performance of his duty as switchman or brakeman, he was guilty of negligence contributing to his injury. The jury returned a verdict in favor of the plaintiff in the sum of \$7,000, and the defendant has appealed.

The court erred, it is said, in submitting the case to the jury because it was not shown that the defendant was guilty of negligence; because the plaintiff had assumed the risk of an injury such as he received; because the plaintiff was guilty of negligence contributing to his injury. Although error is predicated upon certain rulings of the court and the refusal of the court to give certain instructions, and the giving of certain instructions, counsel mainly rely upon the propositions that the defendant was not negligent and that the plaintiff assumed the risk. The witnesses for the defendant testified that the track was planked in front of the coal bins, not for the purpose of affording protection to the employees, but for the purpose of preventing coal from falling to the ground, and that a walk on the south side and outside the track was provided for the employees. It was shown that the coal-bin trestles on many of the railroads, principally in the West, were planked as the one on which plaintiff was engaged was planked. And because no higher degree of care was exercised by other roads than was exercised by the defendant, and because the trestle here was built in accordance with the general custom and usage, and is up to the ordinary and usual standard, defendant insists that, by submitting the case to the jury, the jury was permitted to invent a scheme of trestle of its own and determine the relative merits of the invention and of those trestles in general use and generally approved by railroad men. But a railroad company is not relieved of its obligation to furnish a reasonably safe place by showing what other railroads have furnished, and the fact that open trestles are used on other railroads constitutes no defense to an action of this kind, if, as a fact, the court cannot declare as a matter of law that the place furnished is reasonably safe. The question is not determined by showing that other railroads have been maintained in the same condition as the defendant's trestle, but it is the province of the jury to determine under all the circumstances of the case whether the defendant has or has not been guilty of negligence. "Negligence in a particular case is generally a matter for the jury to determine, and it is always so when the measure of duty is ordinary and reasonable care." *Williams v. Sleepy Hollow Min. Co.*, 37 Colo. 62, 86 Pac. 337, 7 L. R. A. (N. S.) 1170; *Rimmer v. Wilson*, 42 Colo. 180, 93 Pac. 1110. And even though the facts are not disputed, but are such that different minds might honestly draw different conclusions from them, the case must be left to the jury for its determination. So here some persons might conclude that, in the exercise of ordinary diligence to provide a reasonably safe place for its employees, the defendant was

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not guilty of negligence in failing to plank between the rails of the track on the trestle while other persons would regard the failure to plank the entire portion of the trestle an act of negligence, and that a very slight degree of care would prompt the officers of the company to plank the track. And when it is considered that to plank the track involved but slight expense, and would not in the slightest degree interfere with the maintenance and operation of the road, and that there is no necessity for leaving the track in such a condition, we cannot say as a matter of law that the company was not negligent, and that the case should have been taken from the jury. Where the facts are not in dispute, and there can be but one opinion as to their effect, the question is one of law. *Griffith v. Denver Consolidated Tramway Co.*, 14 Colo. App. 504, 61 Pac. 46; *Farrier v. Colo. Springs Rapid Transit Ry. Co.* (decided at this term) 95 Pac. 294; *Liutz v. Denver City Tramway Co.* (also decided at this term) 95 Pac. 600; *Gilbert v. Burlington, etc., Ry. Co.*, 128 Fed. 529, 63 C. C. A. 27. Indeed, it would be extremely difficult to sustain a verdict for the defendant if based upon the ground that the defendant was not guilty of negligence.

Upon the question of the assumption of risk, the court instructed the jury fairly and fully. No objection was made nor exception saved by the defendant to the instructions given upon this subject. The instructions declare it to be the law that where an employee has or might by the exercise of due care have knowledge of defects or imperfections, and continues in his master's service without objection, he cannot recover for injury caused by such imperfections; that the employee is presumed to have taken notice of all risks and dangers open to observation; that it is his duty to use reasonable care to examine his surroundings; that if the employee voluntarily continues in the service of his master with knowledge or means of knowledge equal to that of his master, and continues in the service without objection and without promise on the part of the master to change the conditions, the employee assumes the consequences resulting from such conditions; and that he assumes the hazard of the ordinary perils. The plaintiff testified that the yard in which he was working extended for a distance of about three miles east and west, and that there were many side tracks and switches; that although he worked in the yard for quite a time, and had worked upon the trestle, he had never been called to work upon the unplanked portion of it. The trestle, the scene of plaintiff's injury, was not under his daily observation and inspection, and it was only when coal was needed that the services of a switchman were required; and, although it was shown that the plaintiff was employed on the trestle frequently, his usual employment was in other portions of the yard. At the time plaintiff was injured, there were cars standing on the trestle

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covering a part of the planked as well as the unplanked portion of it, and, as plaintiff was on the car being pushed on the trestle, the unplanked portion was hidden from his view by the standing car. We cannot say, as he had never worked upon the unplanked portion of the trestle, although he may have known that a portion of the trestle was unplanked, that as a matter of law it was his duty to have discovered and to have known where the planking ended, and that he assumed the risk of an injury occasioned by his falling through the unplanked portion under the circumstances shown by the record. The plaintiff in his testimony, in explanation of his conduct while coupling the cars on the trestle, said: "I was directed by the foreman of the switching crew to take the loads of coal onto the trestle. Then I got back on the rear car, and the train was backed up. I had to couple onto the car that was standing on the trestle to keep it from going over the end of the track. It was not safe to butt against it and let it go. I rode upon the trestle, hanging on the car with my foot in the stirrup. * * * When the cars came together, I went in to make the coupling. The west end of the car that was standing on the trestle was over on the planking four or five feet. When the train struck the car, it sprang back to the east, and, when I attempted to make the coupling, I found that the drawbars were of unequal height, and I could not get the link up enough to join. So I was trying to take this link out, walking along with the car. While I was doing this, I had to pound the pin to get it out. I reached out and picked up a piece of iron that happened to be lying there, and pounded the pin by rapping it on the head, trying to loosen it. I did loosen it, and got it out after I had pounded a little. I had the link in one hand and the pin in the other. At the time I fell, I still had the link in my hand, and I dropped the pin just before I went into the hole. I stepped into the first opening." It appears that the foreman was standing on the walk outside the track while plaintiff was endeavoring to make the coupling and when he fell.

The claim of the defendant is that the plaintiff voluntarily chose a dangerous method of coupling the cars, when a safe method was equally practicable, and carelessly and recklessly exposed himself to unnecessary danger; that, as there was nothing to interfere with the plaintiff's seeing that the planking did not extend to the standing car to which he was attempting to couple the train, he should have stopped the train, which would have enabled him to have made the coupling without injury to himself; and that, having chosen a dangerous method of coupling the cars when a safe method of coupling was practicable, his failure to ascertain the nature of the surface constituted contributory negligence as a matter of law. These questions, we think, were for the jury to determine. Whether

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the plaintiff saw, or by the exercise of reasonable caution should have seen, that the track was unplanked, is not a question of law, but a question of fact for the jury's determination. Whether it was or was not the duty of the plaintiff under all the circumstances shown to have stayed out from between the cars, waited until the train was stopped, and then made the coupling, it is not our province to determine. Whether the plaintiff did or did not under the facts disclosed by the record choose a more dangerous method of making the coupling, and that by reason of his selecting the more dangerous method he was injured, is for the jury to pass upon, and is not a question of law for the decision of the court. Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, to be settled by the jury; and this whether the uncertainty arises from a conflict of the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them. *Richmond & Danville R. R. Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642; *Colorado Midland Ry. Co. v. O'Brien*, 16 Colo. 219, 27 Pac. 701. Moreover, the plaintiff was performing his duty under the immediate direction of his foreman, who stood on the walk only a few feet away. The foreman testifies that, as the train was backing up the incline leading to the trestle, it could not be stopped. The plaintiff testified that he "had to couple onto the car that was standing on the trestle to keep it from going over the end of the track. It was not safe to butt against it and let it go." Here, then, was an emergency that gave him no time for reflection, and, even though he saw that the track was unplanked in front of him, he was, to save the company's property, required to make the coupling as soon as possible; and, although he could have stepped from between the cars and thus avoided an injury, under such circumstances, being put in imminent peril through the negligence of the defendant, the error of judgment cannot in law be imputed to him as contributory negligence. *S. C. C. M. Co. v. McDonald*, 14 Colo. 191, 23 Pac. 346; *Denver & B. P. T. Co. v. Dwyer*, 20 Colo. 132, 36 Pac. 1106; *Union Pacific Ry. Co. v. Kelley*, 4 Colo. App. 325, 35 Pac. 923. Therefore the court did not err in submitting the question to the jury.

Complaint is made that the court refused to give certain instructions offered by the defendant. A comparison of the instructions offered with those given shows that the propositions of law contained in the refused instructions are fairly presented by the instructions given.

Other assignments relate to the reception of testimony over the objection of defendant, but, as we do not perceive that the defendant could have been prejudiced by the ruling of the court, we shall not consider the assignments predicated upon the al-

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leged erroneous rulings. The finding that the defendant was guilty of negligence is, we believe, fully sustained by the record, and, as substantial justice has been done, we shall affirm the judgment.

GODDARD and BAILEY, JJ., concur.

BOOTH v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Missouri, Division No. 1, Feb. 25, 1909. Rehearing Denied, March 31, 1909.)

[117 S. W. Rep. 1094.]

Appeal and Error—Abstract—Contents—Order Allowing Appeal.—Rev. St. 1899, § 813 (Ann. St. 1906, p. 783), requiring plaintiff to file a transcript of the record, or, in lieu thereof, a certified copy of the record entry of the judgment, together with the order granting the appeal, and to thereafter file printed abstracts of the entire record, was designed to facilitate the business of appellate courts, by obviating the necessity of searching the transcript for essential points of the record, and its spirit and purpose must control, so that where the appeal was on a short transcript containing a certified copy of the judgment and of the order granting the appeal, made during the term, that the abstract did not contain the order granting the appeal was not ground for dismissal, though the statute, in terms, applied to short as well as long transcripts.

Appeal and Error—Record—Contents—Motion for New Trial.—A motion for a new trial is not a part of the record proper.

Appeal and Error—Record—Bill of Exceptions—Contents—Motion for New Trial.—Where the bill of exceptions recited that appellant filed his "motion for new trial in said cause as follows," referring to a page of the record where it was set out in full, the appeal would not be dismissed on the ground that the bill of exceptions did not contain the motion for new trial, even though the motion was not properly a part of the record proper.

Master and Servant—Master's Duty—Safe Place of Work.*—A master must furnish servants reasonably safe implements and a reasonably safe place to work, and is liable for injuries caused by his failure to do so.

*For the authorities in this series on the subject of the care required of a railroad company, as an employer, to furnish safe appliances, see first foot-note appended to *Southern Ry. Co. v. Moore* (Va.), 30 R. R. R. 487, 53 Am. & Eng. R. Cas., N. S., 487; last foot-note appended to *Cicalese v. Lehigh Valley R. Co.* (N. J.), 29 R. R. R. 167, 52 Am. & Eng. R. Cas., N. S., 167; first foot-note appended to *Norfolk & Portsmouth Trac. Co. v. Ellington's Adm'r* (Va.), 29 R. R. R. 32, 52 Am. & Eng. R. Cas., N. S., 32.

For the authorities in this series on the subject of the degree of

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Railroads—Operation—Lease—Companies Liable for Injuries.†—Public service corporations, such as railroads, cannot lease property without legislative consent, and an attempt to do so is a mere nullity, and a lessor railroad will be held liable for the torts of the lessee in operating the road, exactly as though the lease had not been made.

Appeal and Error—Presumptions—Facts Not Shown by Record.—Where, in an action for injuries caused by being struck by a trolley wire strung over defendant's road which the railroad for which plaintiff was employed was using at the time, where plaintiff did not show by what authority his road was using defendant's road and objected to evidence by defendant to show that fact, it cannot be assumed that it was used illegally or under conditions that rendered defendant liable for the torts of the user.

Railroads—Operation—Companies Liable—Companies Permitting Use of Road by Others.—If an employee of another road was injured by his employer's negligence while using a part of defendant's road, defendant would not be liable for such injuries, where it did not appear by what authority the other company was using its track, or whether it was using it under an unauthorized lease from defendant.

Railroads—Operation—Use by Other Companies—Injuries—Negligence—Obstructions.—In an action for injuries by being struck by a trolley wire strung over defendant's railroad while plaintiff's road was using defendant's track, where the case was tried on the theory that the wire was suspended so low as to endanger plaintiff while passing under it on top of a car, it could not be said as a matter of law that defendant was negligent because the wire was not 22 feet high, at which height Rev. St. 1899, § 1179 (Ann. St. 1906, p. 995), requires street railways to construct its trolley wires above a railroad track which it crosses, even if that statute was applicable, as the wire might have been reasonably high, though less than 22 feet.

Railroads—Operation—Use of Road by Others—Negligence.—That a trolley wire strung over defendant's railroad was only 19 feet 5 inches above the track did not, as a matter of law, require defendant to warn employees of another road, which it permitted to use its track, to look out for danger.

Railroads—Operation—Control of Right of Way.—A railroad has control of its right of way through country districts, and can prevent the erection of structures dangerous to the operation of its trains or

care required of a railroad company in furnishing an employee a safe place to work, see first foot-note appended to *Louisville & N. R. Co. v. Pendleton's Adm'r* (Ky.), 28 R. R. R. 213, 51 Am. & Eng. R. Cas., N. S., 213; first foot-note appended to *Cooney v. Commonwealth Ave. St. Ry. Co.* (Mass.), 27 R. R. R. 627, 50 Am. & Eng. R. Cas., N. S., 627; second foot-note appended to *Finley v. Louisville Ry. Co.* (Ky.), 27 R. R. R. 183, 50 Am. & Eng. R. Cas., N. S., 183; last foot-note appended to *St. Louis, etc., Ry. Co. v. Inman* (Ark.), 26 R. R. R. 433, 49 Am. & Eng. R. Cas., N. S., 433.

†See foot-note appended to *Kirkland v. Charleston & W. C. Ry. Co.* (S. Car.), 29 R. R. R. 661, 52 Am. & Eng. R. Cas., N. S., 661.

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remove such structures; but it does not have exclusive control of its right of way through a public street, being there only by permission, and its rights and those of a street railway whose track it crossed in a public street would be mutual, so that the railroad could not require the street railway to maintain its trolley wire at a certain height for the safe operation of the railroad, its only remedy being an appeal to the city authorities, and hence it could not be said as a matter of law that the railroad negligently permitted the trolley wire to be strung too low so as to make it liable for injuries thereby to an employee of another road using its track.

Railroads—Injuries to Licensee—Pleading—Issues.—In an action for injuries by being struck by a trolley wire strung over defendant's railroad track which plaintiff's employer was using at the time, where the petition only alleged that defendant permitted the street railroad to negligently string the wires, there was no issue as to whether defendant itself erected the wires.

Woodson, J., dissenting in part.

Appeal from Circuit Court, Jasper County; Howard Gray, Judge.

Action by W. E. Booth against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Martin L. Clardy and D. C. Chastain, for appellant.

R. A. Mooneyham, Hugh Dabbs, and R. M. Sheppard (A. L. McCawley, Lee Shepherd, Herbert Crane, and Harry Phelps, of counsel), for respondent.

VALLIANT, J. This suit was begun against the St. Louis, Iron Mountain & Southern Railway Company and the Missouri Pacific Railway Company for damages for personal injuries which plaintiff in his petition alleges he suffered through the negligence of the two defendants. When the plaintiff's testimony was concluded, the court gave the jury an instruction to the effect that the plaintiff could not recover against the Missouri Pacific Company, but refused to so instruct as to the Iron Mountain Company, therefore the plaintiff dismissed his suit as to the Missouri Pacific, and the trial went on against the Iron Mountain and resulted in a verdict for the plaintiff for \$10,000, from which the Iron Mountain Company appealed.

1. Respondent has filed a motion to dismiss the appeal, alleging as a ground therefor that the circuit court did not make an order granting the appeal. The cause comes here on a short transcript; that is, a duly certified copy of the judgment and of the order of the circuit court granting the appeal, which order was made during the term at which the judgment was rendered. How, then, could we say that there was no order allowing the appeal, while we have before us a duly certified copy

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of the order itself? But it is said the abstract does not show it. Suppose that is so; would it not be sacrificing justice to give section 813, Rev. St. 1899 (Ann. St. 1906, p. 783), and the rules of court made in obedience thereto, such an interpretation as would authorize a dismissal of the appeal under these circumstances? That statute was designed to aid in expediting the business of this and the other appellate courts, imposing on the appellant the duty of presenting in brief abstract form the essential points of the record, so that the court could seize the points without consuming time in going through the long transcript to find them for itself. We have often said, and we adhere to it, that the time of the appellate courts is too valuable to be consumed in labor that can be performed by the attorneys in the case, and that we will not search the transcript for what the abstract ought to show. It is true the letter of the statute applies as well to a short as it does to a long transcript, yet its reason and spirit must be looked to in its application. We have held in two recent cases that when the cause is here in the short form—that is, a certified copy of the judgment and of the order granting the appeal—we would not dismiss the appeal because the abstract did not show the order. *Pennowfsky v. Coerver*, 205 Mo. 136, 103 S. W. 542; *Coleman v. Roberts (Mo.)*, 114 S. W. 39.

It is also alleged as a ground for the motion that the abstract does not show that the motion for a new trial was filed during the term at which the judgment was rendered. Respondent is mistaken in point of fact in that particular. The abstract of the record proper shows that the motion was filed within four days after the return of the verdict and during the same term at which the judgment was rendered, that the motion was overruled, and that thereafter the affidavit for appeal was filed and the appeal granted during the same term.

Respondent in his brief says that the motion for a new trial does not appear in the bill of exceptions. That is also a misunderstanding of the abstract. The bill of exceptions purports to set out all the proceedings in pais, and, after setting out the evidence, the instructions, and the verdict, it proceeds: "Thereupon, on the same day, to wit, December 19, 1905, the defendant filed its motion for a new trial in said cause, as follows: (Printed on page 17 of this record.)" Turning to page 17 of the printed abstract, we find the motion in full. But the counsel say that on page 17 the motion appears to have been copied into the record proper, where it had no lawful place. It is true the motion had no lawful place in the record proper, and if it was not in fact set out or called for in the bill of exceptions it would avail the appellant nothing. But the abstract of the bill of exceptions signifies that the motion was copied therein, and the reference to another page where it is printed in full was only to save the

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useless trouble and expense of printing it a second time. The motion to dismiss is overruled.

We pass now to the merits of the case. There is no dispute about the principal facts. Plaintiff was in the employ of the Missouri Pacific Company as brakeman on a freight train of that company. The train was passing over a switch track belonging to the Iron Mountain Company in the city of Carthage. The tracks crossed a public street in that city, Main street, at right angles or nearly so. The track of a street railroad company, whose cars were propelled by electricity through the medium of a trolley wire, was laid in Main street and crossed this switch track of appellant. On the day of the accident the plaintiff was on the top of an unusually tall box car in a freight train belonging to and being operated by the Missouri Pacific Company, in the usual performance of his duty as brakeman, and while in that position he was struck on the neck by the trolley wire as the freight train passed under it, and he thereby received the injuries complained of. The height of the trolley wire above the track was 19 feet 4 inches, that of the car was 14 feet 8 inches. It was of the highest class of freight cars then in use on any railroad, and was about 2 or 2½ feet higher than the usual cars. This car did not belong to either the Missouri Pacific or the Iron Mountain, but to the St. Louis & San Francisco Railroad Company, and was being switched from the tracks of that company to those of the Missouri Pacific in the usual course of through traffic, the Iron Mountain switch track being used to make that connection. The plaintiff was 6 feet 2 inches tall, which, plus 14 feet 8 inches, the height of the car, made 20 feet 10 inches, which was 1 foot 6 inches higher than the trolley wire.

2. Postponing for the present the question of whether the wire was at a sufficient height to enable the defendant company to operate its trains under it with reasonable safety to its own employees, and of whether the defendant was responsible for the lack of height of the wire, if there was a lack, we come to the question, what was the liability of the defendant to the employees of another railroad company using the track? In the manner in which the question is presented in the plaintiff's petition and brief, we may divide it into two questions, to wit: If the injury was caused by the negligence of the Missouri Pacific while using the track of the Iron Mountain, is the latter company liable? Second, if it was caused by a defect in the track rendered so by the impending wire, is the Iron Mountain Company liable? That those are questions of some difficulty were seemingly appreciated by the learned counsel for plaintiff, as shown by the careful and cautious wording of the petition. The petition, as we have already said, was leveled at both companies, and a distinct charge of negligence is made against each.

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The charge against the Missouri Pacific Company is that "its agents and servants in charge of and operating said train" so negligently ran the same under the wire without giving him any warning of its condition, and after they saw, or by the exercise of ordinary care could have seen, his peril, and would have seen that he was unaware of the danger, in time to have avoided the injury, but failed to do so. There the charge is that he was injured by the negligence of his own fellow servants, and that the danger from the wire was so apparent that if they had exercised ordinary care to protect him they would have seen it. Let us assume for the present that the Iron Mountain Company furnished the Missouri Pacific a defective track, that the danger arising therefrom was so apparent (for that is what the petition says) that if the servants of the Missouri Pacific had exercised ordinary care they would have seen it and could have avoided the injury, but failing to observe such care the plaintiff was injured through their negligence. According to that statement, if ordinary care had been exercised the track could have been used with safety, but the plaintiff was injured because of the lack of ordinary care. We have, then, the question above propounded, is the Iron Mountain Company liable for the negligence of the Missouri Pacific while using the Iron Mountain track?

(1) It is the duty of the master to furnish his servant reasonably safe implements and a reasonably safe place in which to work, and failing to do so, if the servant is injured thereby, the master is liable. That liability arises out of the relation of master and servant. But what is the relation between the servant of that master and a third person who furnishes him the implements or rents him the premises in which to carry on his business? Even if there should be a defect rendering the implement or the place unsafe, is the third person liable to the servant? Without pausing to answer that question, we come to the one in this case: Suppose there was a defect in the premises furnished which rendered it unsafe, but not so dangerous but that it could be used with reasonable safety if ordinary care was exercised by the master to protect his servant, but the master failed to exercise ordinary care, and through his negligence his servant was injured, is the third person liable? We do not understand that counsel for the plaintiff rest the claim of the liability of the Iron Mountain Company for the negligence of the Missouri Pacific on the law of master and servant or principal and agent, but they limit their contention to the law that is supposed to apply to railroad companies in particular in like circumstances, and the proposition is reduced to this: Where one railroad company permits another to run trains over its road, it is liable for the negligence of that other in so doing. To some extent there is authority for that proposition, but within limits. In Thompson on

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Negligence, § 585, after discussing the question of the liability of a lessor for the negligence of a lessee, the author says: "But this principle has no application to the case of leases made by railway companies and other corporations having public duties to perform, without the consent of the Legislature. In such cases the law does not allow a corporation to cast off its public duties without the consent of the state and devolve them on another; and, if it attempts to do so, the law treats such attempts as a mere nullity, and holds it liable for the torts of its lessee in operating its road, exactly as though the lease had not been made, or as though the relation of principal and agent existed between the lessor and the lessee." In that statement of the law is comprised the whole doctrine, and the reason for it, that a railroad company is held to a different account for its conduct in such case from concerns engaged in ordinary business, where the law of principal and agent or master and servant applies. Elliott on Railroads, §§ 467 et seq., discusses the same subject with elaboration under the captions of authorized, unauthorized, and fraudulent leases of one railroad company to another, and of one company permitting another to make a joint use of its track, and the same principle as above quoted is recognized. That principle is this: It is not every use that a railroad company may permit another to make of its track that will render it liable for the act of the other company, but only an unauthorized use involving an abuse or a nuisance of its franchise. A railroad company which holds a franchise from the state is under obligation to the state to use that franchise, and is liable for its nuisance, even if the nuisance is the act of another company by its leave, unless the same high authority which granted the franchise grants also the right to assign or lease it. In *Moorshead v. Railway*, 203 Mo. 121, 96 S. W. 261, 100 S. W. 611, this court held that a street railroad company which was authorized by an act of the General Assembly to lease its road to another corporation was not liable for the negligent acts of that corporation in operating the road. In that case there was no question of fraud, nor in the act of the General Assembly was there anything to indicate that it was intended to hold the lessor company liable for the acts of the lessee.

In the case at bar we have no lease to consider, and we really do not know by what authority the Missouri Pacific Company was using the track, for the plaintiff offered no proof on that point, and the defendant was not allowed to make proof. So far as the petition informs us, this was the only time the Missouri Pacific ever ran its train over this track, although the evidence showed that it had been doing so every day for at least 18 months before the accident. But the plaintiff did not undertake to show by what authority the Missouri Pacific was so using the track, and when the defendant offered to prove what the ar-

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rangement between the two companies was under which the track was so used the testimony was, on the plaintiff's objection, excluded, on the ground that it was immaterial, the court saying it made no difference what the arrangement was. Under that ruling the Iron Mountain would be liable for the act of the Missouri Pacific, even if the latter was a trespasser on its track.

Elliott on Railroads, vol. 2, § 477, says: "It is held by the Supreme Court of the United States that a railroad company which permits another to make a joint use of its track is liable to a person injured by the negligence of the company to which the permission is granted." The learned text-writer is not entirely in accord with that doctrine, but he says the weight of authority seems to be that way. In a note to the text the case cited as deciding that point is *Railroad v. Barron*, 72 U. S. 90, 18 L. Ed. 591. But the facts of that case presented a very different question from that which arises on the facts in this case. In that case the person injured was a passenger in a train that was owned and being operated by the defendant railroad company that owned the track, and the accident was caused by the train being run into and crushed by an express train belonging to another railroad company which was using the track by permission of the defendant company. The theory of that case is that the railroad company which owned the track was not taking proper care of its own passengers when it permitted another train not under its own management to intrude. That case is probably responsible for much that has been written on that subject, but when read in the light of its own facts it does not justify all that has been written; it does not, at least, justify the conclusion that respondent in this case draws from it.

Bennett v. R. R., 102 U. S. 577, 26 L. Ed. 235, is also cited, but that does not bear on the question before us. The railroad company was held liable in that case, not on any rule of law applicable particularly to railroad companies, but on the general principle that any one who owns land and induces others to come upon it for a lawful purpose is liable to them in damages resulting from an unsafe condition of the premises, if he negligently suffered the dangerous condition to remain after he had notice of it and gave the public no warning. In that case the railroad company owned and maintained a wharf connecting its railroad depot with a steamboat landing, and a passageway was built by the railroad company to enable persons passing from the depot to the steamboat. There was a hatchway on the premises, though not in the walkway, that was designed for foot passengers. Plaintiff in the night attempted to go to the steamboat landing, but the light which he carried was blown out by the wind, and in the darkness he lost his way and fell into one of the hatch holds.

We do not discover in any of the other cases cited by the

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counsel for respondent anything in conflict with the principle we have above stated. Cases there are which hold that a railroad company is liable to its own employee or its own passenger for an injury resulting from a condition which it permitted another to make and over which it had control, rendering the running of trains on its road more dangerous. The law for such cases is found either in the law of master and servant or in the law of carrier and passenger. But in this case there has been no injury to a servant or a passenger of the defendant, the Iron Mountain Company.

When a railroad company is sued for an injury alleged to have been inflicted through the negligence of another company operating a train on its road, the burden of proof may be on the company that owns the road to show its lawful right to allow the other company to use its track, as in the Moorshead Case above referred to; but when in such case the plaintiff does not show by what authority the other company was using the road, and will not allow the defendant to show it, we have no right to assume that the use permitted was in violation of law or under conditions that rendered the owner of the track liable for the torts of the user.

If a flood following an extraordinary rain storm should wash away a bridge or otherwise render a railroad temporarily unfit for travel and its trains should be delayed, if another railroad company, in view of the distress, should permit one of the delayed trains to pass over its tracks in furtherance of its journey, and if a passenger on such train should be injured through the negligent management of the train by its own train crew, there would be neither law nor reason nor common justice in saying that the railroad company that owned the track was liable merely because it suffered the other company to pass its train over the track.

Under the facts of this case, we hold that, if the plaintiff was injured through the negligence of the Missouri Pacific Company, the Iron Mountain Company is not liable although the Missouri Pacific was at the time using the Iron Mountain track. If the Iron Mountain Company is held liable in this case, it must be because of its own negligence.

(2) This brings us to the consideration of the second question above propounded, to wit, if the injury was caused by a defect in the track, and that defect was caused by the impending wire is the Iron Mountain Company liable? The petition charges the defendant, the Iron Mountain Company, with negligence in three particulars, viz.: First, it says that it was its duty to have maintained the wire at a height of not less than 22 feet; second, that it was its duty to have warned the employees of the Missouri Pacific of the dangerous condition of the wire; third (and it is

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the main charge), that the defendant permitted the street car company to maintain the wire at the alleged unsafe elevation.

When the plaintiff alleged in his petition that the defendant should have maintained the wire at the height of 22 feet, he doubtless had in mind the statute, section 1179, Rev. St. 1899 (Ann. St. 1906, p. 995), which is in these words: "All street railway companies or corporations operating cars by electricity, or by overhead wires, shall construct and maintain its wires at a height of not less than twenty-two feet above the top of the rail of the railroad track crossed by such street railway company, and the wires of such street railway company shall be guarded, or provided with fenders or guard wires, so as to prevent the same from coming in contact with the cars, track or telegraph line along the track of such railroad company." But the plaintiff, doubtless understanding the section, as its language indicates, to be a law for the conduct of street railroads, did not ask that the cause be submitted to the jury on the theory that the defendant was guilty of negligence as for not conforming to the requirements of that section, but the instructions asked by the plaintiff and given were solely on the theory that the trolley wire "was suspended over said railroad so low as to endanger the plaintiff in passing under the same while standing in the usual and customary position on top of said train." Those words tendered an issue of fact which was not answered by the statute. As a matter of fact, the wire may have been reasonably high for the usual business of the defendant though less than 22 feet, and that is the theory on which the plaintiff asked to go to the jury. The defendant was not negligent on the ground that the wire was not 22 feet high.

The next proposition announced in plaintiff's petition is that, because the wire was suspended only 19 feet 5 inches above the track, the duty devolved on the Iron Mountain Company to give the employees of the Missouri Pacific Company warning to look out for the danger. That proposition does not seem to be seriously urged, and we know of no theory of law on which it could be sustained.

Plaintiff's last charge of negligence is that the Iron Mountain Company permitted the street car company to maintain the wire at the alleged unsafe height. The petition nowhere charges that the Iron Mountain Company maintained the wire, or that the street railroad company derived its authority from the Iron Mountain Company to erect and maintain it, or that the Iron Mountain Company had any control over the street railroad company, but the whole charge is compassed, somewhat vaguely, in the assertion that the Iron Mountain Company permitted the street railroad company to do the thing complained of.

We do not find in any of the many cases cited by respondent in his brief one answering the vital question in this case. In his

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brief respondent assumes that appellant had control of the wire, because he says it was on appellant's right of way. If that were so, and if the wire was so low that it rendered the passage of trains under it unsafe for the men operating the trains with reasonable care, we would have a very different case to decide. A railroad company has control of its right of way through the country, and has the right to keep any one off who erects or attempts to erect a structure dangerous to the operation of its trains, and has the right to remove offensive structures. But this trolley wire was not on premises that the railroad company controlled; it was on a public street which was in the control of the city. The street car company was there presumably by the same authority that the railroad company was, and with as much right. If either was doing wrong to the injury of the other, an appeal to the city authorities or to the courts was the only means of redress. If a corporation using electric wires should stretch a wire across a railroad company's right of way in the country at an elevation that rendered it dangerous to persons on trains of the railroad company, the latter would have a right, after reasonable notice to the offending company, to cut down the poles and remove the wire, and so it would anywhere where the railroad company had full control of its right of way. But a railroad company lays its tracks in a public street only by permission, and its use of the street, even that part which its tracks actually cover, does not belong to the railroad company, and is not under its exclusive control. The portion of the street occupied by the defendant's railroad was, in a limited sense, its right of way, and so the portion occupied by the street railroad company was its right of way, and the point where their respective tracks actually crossed each other belonged as much to one as it did to the other, and it belonged to neither nor to both exclusively. If this trolley wire had crossed the defendant's right of way at a point where the defendant had control, it might with propriety be said that the defendant permitted the street car company to maintain it; but that was not the fact; it crossed defendant's track in a public street where the defendant could neither refuse to allow it to cross or permit it to do so.

There was some effort made to show that the defendant company erected the wire, but that effort went no farther than to show that the railroad company which formerly owned the track furnished the street railroad company the poles on which to elevate the wire at that point higher than it had been originally. The street railroad company erected the wire, and there was no suggestion that the poles were not tall enough to have allowed the wires to have been raised higher. Besides, that was not really a question in the case; the petition did not state that the defendant company had erected the wire, but the charge was that it had

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permitted the street railroad company to do the thing complained of.

We therefore hold that there was no evidence to sustain the charge that defendant permitted the wire to be maintained.

3. Perhaps it may be said that there was evidence tending to show that the wire at the height it was maintained was not reasonably safe. The wire was not 22 feet high, as the statute above mentioned requires, but this suit is not under that statute. If plaintiff had sued the street railroad company for the injury, there is authority for saying that it would have been liable under the statute. *Smedley v. St. L. & Sub. Ry. Co.*, 118 Mo. App. 103, 93 S. W. 295. A wire may be at a height which under the circumstances of the case is reasonably safe for trains passing under it although not 22 feet high. We are not now speaking of a case in a suit against a street railroad company founded on that statute, but we confine what we say to the case at bar. Plaintiff seems to have assumed that the height required by the statute was the standard, and because this wire was not up to that standard it was dangerous; but that cannot be assumed under the petition in this case. The charge in the petition is that it was maintained at an elevation too low to be reasonably safe when used with ordinary care. That is a question of fact. Plaintiff contented himself with showing that the height of the wire was 19 feet 5 inches, and that he was struck by it on the neck as, the car on which he was standing passed under it. But the plaintiff's evidence also showed that the car in question was unusually tall, 2 to 2½ feet taller than the ordinary, and that he was an unusually tall man, 6 feet 2 inches in height. The conductor of the train standing on the same car near the plaintiff passed safely under the wire. Plaintiff's testimony also showed that for at least 18 months he had been passing under this wire on freight trains at least once a day and sometimes oftener, sometimes standing on box cars, more frequently on flat cars, and was never hurt. If the mere fact that the plaintiff got hurt while standing at his full height on an unusually tall car can be said to be evidence tending to show that the wire was not at a reasonably safe height for men passing under it, observing ordinary care, the fact that trains of this kind had been passing under it in safety for at least 18 months would seem to put the question at rest. But we do not say that if that had been the only question in the case the court erred in submitting it to the jury.

4. We think the evidence conclusively shows that it was the plaintiff's own negligence that caused the accident. He was as familiar as one could be with the premises. He knew that the wire was there; he passed under it on an average of at least once a day, sometimes several times in a day, for a period of at least 18 months. Sometimes he passed under the wire standing on the top of box cars, more frequently on flat cars, but often enough to

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have given him full knowledge of the situation. He was an experienced brakeman, and knew the class and character of freight cars. This was a car of unusual height, which fact was plain to view; he climbed on it from the ground to the top, and he could not have failed to have noticed its unusual height if he had paid any attention to it. But, unfortunately for him, for the moment he was unmindful of the situation. In charging negligence against the Missouri Pacific, he says in his petition, in effect, that the danger was so apparent that the servants of the Missouri Pacific in charge of that train were negligent in not observing it and warning him of the danger. If they could see, why could not he? He had as fair a view of the situation as any of his fellow servants.

We hold that there was no evidence tending to sustain the charge that the defendant, the Iron Mountain Company, permitted the street railroad company to maintain the wire, or that the Iron Mountain Company was responsible for the height at which the wire was maintained; and we also hold that the Iron Mountain Company is not liable under the pleadings and evidence in this case for the negligence of the Missouri Pacific Company, if there was such negligence; and we further hold that the plaintiff's own evidence shows that the accident resulted from his own negligence in failing to notice the wire as he was passing under it.

After what is above said, it is unnecessary to discuss the instructions.

The judgment is reversed.

STATE v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, April 13, 1909.)

[117 S. W. Rep. 1173.]

Indictment and Information—Issues and Evidence—Time of Offense.—One charged with violation of law on a certain day may be convicted on proof that he committed the act on any day within the period of limitation prescribed for prosecution.

Criminal Law—Evidence—Other Offenses.—Where defendant is charged with the violation of law on a certain day and the evidence shows a violation on that day, the prosecution cannot then show a similar act on other days.

Criminal Law—Evidence—Other Offenses.—In the prosecution of a railroad company under Laws 1907, p. 180, for failure to run a passenger train over a certain portion of its road on a certain day, where the evidence clearly identified the train operated by defendant with the day specified, it was error to admit evidence of the kind of trains defendant ran over that road and their delay in arrival and departure on other days.

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Statutes—Construction—Meaning of Words.—Rev. St. 1899, § 4160 (Ann. St. 1906, p. 2252), requires courts in construing statutes to interpret "words and phrases in their ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." Held, that the words "passenger train" and "regular passenger train" have no technical meaning in law, and are therefore to be construed in their ordinary sense.

Statutes—Construction—Words of Doubtful Meaning.—Words in a statute of doubtful meaning are to be interpreted by their context and in view of the purposes of the Legislature.

Railroads—Operation—Statutory Regulation—"Train"—"Passenger Train"—"Regular."—The word "train," as used in reference to railroad traffic, means all kinds of trains, freight trains, passenger train, mail train, construction train, etc., and the character of the train is designated by another word. In the term "passenger train" the word "passenger" is used as an adjective to qualify the noun "train." The two words "passenger train" combine to form the name of the thing to which it is applied. Neither word used alone would designate the object intended, but together they constitute the name. The word "regular" is designated to express the character of the train to which it is attributed. It signifies that it is a regular train, whether freight or passenger.

Railroads—Operation—"Regular" Train.—The word "regular," when used to designate a railroad train, applies to the operation of the train whether it be a freight train or a passenger train, but if it has its designated place on the published schedule, and if it ordinarily arrives and leaves as designated in that place, it is a regular train. Thus there may be two passenger trains, one regular and the other irregular, one that is scheduled on the time-table and the other not; yet the irregular train is as much a passenger train as the regular one.

Railroads—Operation—"Passenger Train"—"Regular Passenger Train."—The term "passenger train" includes all passenger trains, regular and irregular, not only trains that move every day on scheduled time, but excursion trains, special trains, extra trains, etc.; whereas, the term "regular passenger train" means a passenger train on the regular published schedule.

Railroads—Operation—Statutory Regulation—"Passenger Train."—A railroad train composed of an engine and tender, two or more freight cars, combined baggage mail and passenger car, and a passenger coach, is a "passenger train" within Laws 1907, p. 180, requiring railroad carriers to run at least one passenger train over its road each way every day.

Railroads—"Local Freight."—The term "local freight" means a train of freight cars receiving and delivering goods within a limited distance, and carrying at the rear end a caboose for the accommodation of the train crew, and, incidentally, a few passengers.

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In Banc. Appeal from Circuit Court, Benton County; C. A. Denton, Judge.

The Missouri Pacific Railway Company was convicted of violation of law with respect to the operation of its passenger trains, and appeals. Reversed.

C. D. Corwin, Roy D. Williams, and Sam B. Jeffries, for appellant.

Elliott W. Major, Atty. Gen., W. S. Jackson, and C. C. Barrett, for the State.

VALLIANT, C. J. Defendant was convicted and fined \$100 as if for failure to obey the requirement of an act of the General Assembly approved March 19, 1907 (Laws 1907, p. 180), entitled "An act to compel all railroad corporations or persons operating a railroad or part of a railroad in this state to run at least one passenger train over said railroad each way every day, and fixing penalties for violation thereof." The first section of that act is as follows: "Section 1. That all persons, copartnerships, companies or corporations operating any railroad or part of a railroad in this state shall, unless hindered by wrecks or providential hindrance, run at least one regular passenger train each way every day over all lines, or part of a line, of railroad so operated by such person, copartnership, company or corporation in this state, which train shall stop at all regular stations along the line of such railroad for the purpose of receiving and discharging passengers." Section 2 prescribes the penalty of not less than \$100 nor more than \$500 for each violation. The information charges that defendant owned and operated a railroad extending from Sedalia to Warsaw, connecting at Sedalia with its main line; that on February 14, 1908, there being no wreck or providential hindrance, defendant did "fail and refuse to operate a regular passenger train each way over" that railroad. Defendant filed a motion to quash the information on the ground that it charged no offense against the law because the act of the General Assembly above mentioned on which the information was based was unconstitutional in several particulars, specifying in the motion certain clauses in the state and in the federal Constitution which defendant thought were violated. The same points were also presented in the motions for a new trial and in arrest of judgment. It was the constitutional question that brought the appeal to this court, but, unless we find in the record evidence sufficient to sustain the court's finding of guilty as charged in the information, we will have to decide the case before we reach the constitutional question.

The information charged the defendant with failure to run a regular passenger train each way on the 14th February, 1908. One indicted for committing an act in violation of law on a certain day may be convicted if it be proven that he committed the act

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specified in the indictment on any day within the period of limitation prescribed for prosecution of the act; but, if he is indicted for committing a certain act on a certain day and the state's proof is to the effect that he did the act specified on the day specified, the state would have no right to go back over the period of the statute of limitations, and prove that he did similar acts on other days. The day specified in the indictment, if it be within the statutory period, is ordinarily not a vital point to be proven, but the act which it is charged the defendant committed is vital, and, where that act is identified by the state's proof, it is the act on which the state must rely for conviction, and, unless the facts proven are sufficient to constitute the criminal act charged, the state cannot go back or forward over the statutory period, and prove other facts that have no connection with the particular act for which the defendant is indicted in order to supply what may be lacking to render the particular act specified a violation of the law.

The evidence in this case wandered farther than it should. The defendant was charged with having failed to run a regular passenger train both ways on this road on the 14th February, 1908, in violation of the statute, and, to sustain that charge, the state proved that on the 14th February, 1908, the defendant ran both ways on the road a train composed of an engine, tender, two or more freight cars, a combined baggage, mail and passenger car, and a passenger coach, and that no other train was run on that day. That proof was a complete identification of the act specified in the information and a complete identification of the day specified on which it was committed. Therefore there was no occasion to go over a period of six months, as the state was allowed to do to prove what kind of trains defendant ran on other days during that period and the delay in the arrival and departure of some of those trains. It was shown in evidence for the state that there was a schedule for the arrival and departure of the trains, and there was no evidence that this train on this day did not arrive and depart on the schedule time. Defendant was called into court to answer for its conduct in running that train, not to answer why another train six months before was delayed. Here, then, we have a train equipped with an ordinary passenger coach and also a car divided into compartments, designed to carry baggage in one compartment, mails in another, and passengers in another, and the train running on a published schedule as to time, but, in addition to those cars, the train contained two or more freight cars, and that fact alone is what the state relies on to prove that this was not a regular passenger train. The question, therefore, is: Does that train fill the requirements of the act of 1907, is it a regular passenger train, or, reducing the question to its simplest form, is it a passenger train? The title to the act does not use the term "regular passenger train," but says it is "an act to compel

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all railroad corporations * * * to run at least one passenger train over said railroad each way every day," etc. In the body of the act it says "one regular passenger train." We have no right to presume that the Legislature by using the term "regular passenger train" in the body of the act intended to call for a train of a different construction or composition from that mentioned in the title under the term "passenger train;" because, if we did, we would have to say that they intended to express a different purpose in the body than that indicated in the title, which the Constitution forbids. Our task now is to find what the Legislature meant by the use of those terms in the title and in the body of the act. What is a passenger train? What is a regular passenger train? What is the difference in the meaning between the two terms, "a passenger train" and "a regular passenger train?" The General Assembly has used those terms, but has not undertaken to define them, and it has used them in a criminal statute, rendering the violator of the statute liable, if he misunderstands its purport or misinterprets its meaning, to a penalty of \$100 to \$500 a day, and he is liable to indictment for his conduct each and every day in which he acts upon his erroneous (though it may be perfectly honest and not altogether unreasonable) interpretation of the words used in the statute, and thus in the course of a few months, at the rate of \$100 to \$500 a day, the penalties might amount to a considerable sum. If the General Assembly had intended to require the railroad company under a heavy penalty to run each way every day a train composed exclusively of cars designed for the accommodation of passengers, it would have required no great skill in the use of language to have said so, and, if that was its purpose, it no doubt would have said so. Our statute requires us in construing statutes to interpret "words and phrases in their ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law, shall be understood according to their technical import. * * *" Section 4160, Rev. St. 1899 (Ann. St. 1906, p. 2252). The words we are now discussing have no technical meaning in law, and are therefore to be construed in their ordinary sense, but the difficulty is that there is room for honest and intelligent differences in opinions as to their ordinary meaning, and the record and briefs in this case show that there are in fact such differences of opinions. If the term "passenger train" has any well-established technical meaning in the parlance of railroad men, no proof of that fact was offered. Some of the state's witnesses called this "a mixed train," but they did not profess to speak with authority. It was only the opinion of individuals, and that too of individuals not especially qualified to instruct on that subject. The Attorney General in his brief says that we must take judicial cognizance of the meaning of the phrase "regular passenger train." But there is no such universal acceptance of a definition of that term as will justify us in

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saying that such is the law. Perhaps the term "local freight" is in such common use in this state that we might safely say that it means a train of freight cars receiving and delivering goods within a limited distance, and carrying at the rear end a caboose for the accommodation of the train crew, and, incidentally, a few passengers. But, if that is correct, the train in question in this case was not a "local freight," for it was equipped with an ordinary passenger coach, and a combined baggage, mail, and passenger car. Nor can we avoid the question by saying this was a "mixed train," because, conceding that it was a mixed train, as in a certain sense it was, can we say that a train having cars designed and used only for the carrying of passengers and their baggage is not a passenger train because it also has cars designed for freight only? To try to get rid of it by calling it a mixed train would be begging the question.

Words of doubtful meaning in a statute are to be interpreted by their context in view of the purpose of the lawmaker. The words we are now considering have been interpreted by courts of other states when used in a statute having reference to a particular purpose. In 6 Words & Phrases, p. 5227, reference is made to a case in Minnesota in which the defendant, being under contract to furnish the plaintiff railroad company depot facilities for its "passenger trains," refused to allow the plaintiff to use the passenger depot for its mixed trains—that is, trains composed of freight cars and passenger cars—but the court held that such a train was a "passenger train" within the meaning of the contract. *Chicago G. W. Ry. Co. v. St. Paul Union Depot Co.*, 68 Minn. 220, loc. cit. 223, 224, 71 N. W. 23. And the same author (volume 7, p. 6038) takes up the phrase "regular passenger train," and refers to some Illinois cases in which that phrase is considered in reference to the purpose of the statute in which it is used, the most recent one of which is *C., C. & C. Ry. v. People*, 175 Ill. 359, 51 N. E. 842, construing a statute that required railroad companies to stop "all regular passenger trains" at county seats to receive and discharge passengers. The railroad company ran a train called the "Knickerbocker Special," which it is said "is not a regular passenger train carrying passengers from one point to another in Illinois, but is a special train engaged exclusively in interstate travel from points wholly without to points wholly without the state of Illinois, that no tickets are sold or passengers received on the train from points in Illinois to points in Illinois, and that it makes no stops except such as are necessary for fuel, water, and railway crossings," etc. It was not questioned that that was a passenger train, but the question came on the meaning of the word "regular." It was not claimed by the able counsel for the railroad company in that case that the term "regular passenger train" had any well-established peculiar meaning in the parlance of railroad men, but it was earnestly in-

sisted that the train then in question was a train put on to meet a certain interstate traffic demand; limited alone to interstate business, and in that sense was essentially a special, and not a regular, train. But the court turned to the statute, and considered the purpose the lawmakers had in view in requiring trains to stop at county seats, and concluded that that train came within the meaning of the phrase "regular passenger trains" for that purpose.

Since, therefore, there is no recognized technical definition of the phrase "regular passenger train," we must go to our statute, and ascertain, if we can, what our General Assembly meant by it in the act of 1907, and, if we cannot with reasonable certainty determine what it means, we cannot convict a person or corporation of violating it. The word "train" is used in reference to railroad traffic to mean all kinds of trains, freight trains, passenger train, mail train, construction train, and the character of the train is designated by a word. In the term "passenger train" the word "passenger" is used as an adjective to qualify the noun "train." The two words "passenger train" combine to form the name of the thing to which it is applied. Neither word used alone would designate the object intended, but together they constitute the name. The word "regular" is designed to express the character of the train to which it is attributed. It signifies that it is a regular train, whether freight or passenger. Regular in what? The state contends that it means regular in its makeup—uniform in its composition. The defendant, contra, contends that it means a train running regularly on a prescribed published schedule, not an excursion train, not a special train for a single trip, not a wild train, but one that goes by the published card. We think the defendant's interpretation of the word is correct. The meaning of the word "regular" in this connection would be more apparent if we would use it in contrast with its opposite—"irregular." When we hear a particular train spoken of and called an irregular train, we have no difficulty in understanding what is meant by the term. It is a train that is not down on the regular list. It runs not on a published schedule. It gives the public no notice of its coming or of its purpose, or of whether it is going. We are satisfied that the word "regular," when used to designate a train, applies to the operation of the train. It may be a freight train, or it may be a passenger train; but if it has its designated place on the published schedule, and if it ordinarily comes and goes in that place, it is a regular train. Thus there may be two passenger trains one regular and the other irregular—one that is down on the published time-table and the other not—yet the irregular train is as much a passenger train as the regular one. The answer to a question we have in this opinion above suggested, to wit, what is the difference in the significance of the terms "passenger train" and "regular passenger train," is this: The term "passenger train" includes all passenger trains, regular and irregular, not only trains that move every day on schedule time, but

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excursion trains, special trains, extra trains, etc., whereas, the term "regular passenger train" means a passenger train on the regular schedule list. We have in another section of our statutes express recognition by the General Assembly that a passenger train may carry freight cars. Section 1101, Rev. St. 1899 (Ann. St. 1906, p. 938). "In forming a passenger train, baggage, freight, merchandise of lumber cars shall not be placed in rear of passenger cars." In the train in question in this case the freight cars were not placed in rear of passenger cars. That it was the running and the operating of the train that the General Assembly had in mind when it used the word "regular" in this connection is indicated also in the closing sentence of the first section of the act: "Which train shall stop at all regular stations along the line of such railroad for the purpose of receiving and discharging passengers." This train complied with that requirement. The purpose of the act was to afford the traveling public railroad facilities at least once a day at regular times and at all the regular stations, not leaving the public to the whim or caprice of the railroad company whether it would send a train over its road on a particular day. If the General Assembly had seen fit to say that, in order to render the passenger service more agreeable and expeditious, the railroad company should carry no freight cars in the train, it would have said so, or, if it had seen fit to define what it meant by a passenger train, we would have had no trouble with construing the act as we now have it; but it has been satisfied to say that the defendant must run "a passenger train," and we do not feel justified in saying that the defendant did not run a passenger train as the statutes requires when the evidence shows that it furnished a train equipped as this was with an ordinary passenger coach furnishing facilities for the carrying of all the passengers (so far as the evidence shows to the contrary) that desired to be carried and their baggage in the usual way; nor can we say that it was not a regular passenger train when the evidence shows that it was run on regular schedule time, and, so far as the evidence shows to the contrary, it stopped at all the regular stations to receive and discharge passengers. We hold that there was no evidence tending to show that the defendant violated the statute.

All the evidence in the case being the state's evidence, the court should have found the defendant not guilty as charged in the information. This conclusion disposes of the case before we reach the constitutional question concerning which much learning and ability has been shown in the briefs and in the oral arguments. But, before this corporation can have our judgment on the question of the impairment of its religious liberty, it will have to take off its Sunday train on that branch of its road and incur the wrath of the state for so doing.

The judgment is reversed, and the defendant is discharged. All concur.

JONES *v.* SEABOARD AIR LINE RY. CO.

(Supreme Court of North Carolina, April 14, 1909.)

[64 S. E. Rep. 205.]

Master and Servant—Acts of Servant—Liability of Principal.*—A master is liable for the torts of his servant committed wantonly or willfully while on duty, and within the scope of his employment.

Master and Servant—Acts of Servant—Liability of Master—Issues.—Where, in an action against a master for an assault committed by his servant, the court submitted the issues whether plaintiff was injured by the wanton act of the servant as alleged, and whether the servant was at the time acting within the scope of his employment, the second issue was consistent with the first, and, though the first was answered affirmatively, an affirmative answer to the second was essential to support the action.

Railroads—Removal of Trespassers—Act of Servant—Scope of Employment—Question for Jury.†—Where, in an action against a railway company for an assault committed by its flagman on plaintiff, the undisputed evidence showed that plaintiff attempted to climb on a moving freight train; that the flagman told plaintiff to come to him; that plaintiff started to run; and that, when eight feet from the car, the flagman shot him twice—it was for the jury to draw the inference whether the flagman was acting at the time in the scope of his employment.

Appeal and Error—Objections in Lower Court—Findings of Fact.—Where the jury in an action against a master for an assault committed by a servant found that the servant was not acting within the scope of his employment, and no exception was taken or motion made to set aside the verdict, it will not be reversed on appeal.

Clark, C. J., dissenting.

*For the authorities in this series on the question whether the master's liability for the negligence or torts of his servants depends upon whether they occurred while the servant was acting within the scope of his employment, see foot-notes appended to *Waler v. Great Northern Ry. Co.* (S. Dak.), 30 R. R. R. 775, 53 Am. & Eng. R. Cas., N. S., 775; foot-notes appended to *Ballard's Adm'r v. Louisville & N. R. Co.* (Ky.), 30 R. R. R. 494, 53 Am. & Eng. R. Cas., N. S., 494.

For the authorities in this series on the question whether the master is liable for the willful torts of his servant, see foot-note appended to *Alabama & N. R. Ry. Co. v. Harz* (Miss.), 24 R. R. R. 479, 47 Am. & Eng. R. Cas., N. S., 479.

†For the authorities in this series on the question, what acts of a servant, are, and are not, within the scope of his employment, see foot-notes appended to *Waler v. Great Northern Ry. Co.* (S. Dak.), 30 R. R. R. 775, 53 Am. & Eng. R. Cas., N. S., 775; last foot-note appended to *Mills v. Seattle, etc., Ry. Co.* (Wash.), 30 R. R. R. 621, 53 Am. & Eng. R. Cas., N. S., 621; last head-note of *Daugherty v. Chicago, etc., Ry. Co.* (Iowa), 28 R. R. R. 558, 51 Am. & Eng. R. Cas., N. S., 558; foot-note appended to *Hirst v. Fitchburg & L. St. Ry. Co.* (Mass.), 28 R. R. R. 372, 51 Am. & Eng. R. Cas., N. S., 372.

Jones v. Seaboard Air Line Ry. Co

Appeal from Superior Court, Scotland County; Long, Judge.

Action by Farrior Jones, by next friend, against the Seaboard Air Line Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Action for damages alleged to have been sustained by plaintiff by reason of an assault committed upon him by defendant's agent while acting in the scope of his employment. The plaintiff testified that he attempted to climb upon defendant's box car attached to a moving freight train, catching hold of the iron bars, for the purpose of stealing a ride; that a flagman on top of the car told plaintiff to come up to him, when he, plaintiff, started to run, had gone about eight feet from the car when the flagman shot him, shot him twice, inflicting the injury from which he suffered, etc. Plaintiff was at the time of the shooting 16 years of age. This was the entire evidence in regard to the transaction. There was evidence regarding the extent of the injury. Defendant moved the court for judgment of nonsuit. Motion denied. Exception. His honor submitted the following issues to the jury:

"(1) Was the plaintiff injured by the reckless and wanton acts of the defendant's agent as alleged in the complaint?

"(2) If the plaintiff was injured by the reckless and wanton acts of the defendant's agent, as alleged in the complaint, was such agent at the time acting in the line of his duty, scope of his employment, and furtherance of the business of defendant company?

"(3) What damage, if any, is plaintiff entitled to recover?"

The jury answered the first issue "Yes," the second "No," and the third "\$200." Defendant moved for judgment upon the verdict. Motion denied. Defendant excepted. Judgment for plaintiff. Defendant excepted, assigned errors, and appealed.

John D. Shaw and Murray Allen, for appellant.

Jonathan Peele and J. A. Lockhart, for appellee.

CONNOR, J. Passing the question raised by defendant's exception to his honor's refusal to grant the motion for judgment of nonsuit, and assuming, for the purpose of disposing of this appeal, that the question whether the flagman when he shot plaintiff was acting in the scope of his employment or the line of his duty was properly submitted to the jury, the defendant is entitled either to a judgment upon the verdict or to a new trial. While the members of the court are not agreed in regard to the correctness of his honor's ruling upon the motion for judgment of nonsuit, a majority of them are of the opinion that defendant was entitled to have its motion for judgment upon the verdict allowed. Whatever differences of opinion may have existed in the past, the decided weight of judicial opinion concurs that for

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torts committed by the servant while on duty and acting within the scope of his employment, or line of his duty, proximately injurious to another, the master is liable. The fact that the tort was committed recklessly, wantonly, or willfully, if within the scope of the employment, does not exonerate the master. The view which has after most careful consideration been adopted by both English and American courts is thus stated by Sir Frederick Pollock, probably the most accurate writer on the subject now living: "A master may be liable for the willful and deliberate wrongs committed by the servant, provided they be done on the master's account and for his purposes." For an interesting and exhaustive discussion of this subject, see 2 Beaven on Neg. book IV, p. 554. This limitation is both scientific and practical. Certainly no one will seriously contend that a master is an insurer of his servant's conduct in respect to torts committed by him while in his employment without regard to the pivotal question whether such conduct had any relation to or was in the scope of the employment. To maintain that he is, it must follow that almost unlimited control should be given the master over the servant, to the end that he may protect himself against such unlimited liability. The law must be both reasonable and practical; that is, it must commend itself to the sense of justice of the average man, and be capable of practical application to the manifold relations of our modern, industrial, social, and domestic life. It is manifest that judicial thought upon the subject since the decision of *McManus v. Crickett*, 1 East, 106, has been affected by the introduction of the industrial corporation into the field of litigation, and the measure and standard of liability of the master for the torts of the servant has been enlarged and extended to meet the changed conditions of employment of servants by these impersonal agencies. Liability has been fixed upon corporations for torts of its servants, which, if applied to natural persons, engaged in mercantile, mechanical, and agricultural employments, and especially to those employing domestic servants would shock the reason, produce startling consequences and be restricted by legislation. Mr. Beaven, speaking of the development of the doctrine of liability of the employer for the torts of his employee, says: "From this limited beginning its scope has become so almost universal in modern law that Jessell, M. R., thus comments on it: 'It is clear that on principle a man is liable for a man's tortious act if he expressly directs him to do it, or if he employs that other person as his agent, and the act complained of is within the scope of the agent's authority. I agree that the court ought to be very careful how it extends the doctrine of respondeat superior. It has been carried in our law very far indeed. I think quite far enough.'" *Smith v. Keal*, 9 Q. B. D. 351. However this may be, and whether the law is at present upon a permanent and satisfactory

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basis, it is manifest that for the torts of the servant the master's liability is limited to those committed within the scope of the employment in furtherance of his business, for, as said in *McManus v. Crickett*, *supra*, "no master is chargeable with the acts of his servant, but when he acts in the execution of the authority given him." The same thought is clearly expressed by Mr. Justice Walker in *Daniels v. Railroad*, 136 N. C. 530, 48 S. E. 818, 67 L. R. A. 455: "When a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for his acts." The subject has been so recently discussed by all of the members of this court and all of our own and many other authorities cited in *Stewart v. Lumber Co.*, 146 N. C. 47, 59 S. E. 545, that no good results would come from a repetition of what was there written. While the writer of this opinion upon the verdict of the jury in that case dissented from some of the views expressed in the prevailing opinion, he does not understand that the decision in that case brings into question the principle that liability of the master for the torts of the servant is limited to those done in the scope of the employment. The principle upon which the opinion of Mr. Justice Brown was concurred in by the Chief Justice and Mr. Justice Hoke was that, when the master placed in the control of his servant a dangerous instrumentality for the purpose of carrying on his business, the law imposed upon him the duty of prevision and precaution. This view was very strongly stated in the concurring opinion of Mr. Justice Hoke. While the writer differed from the justices in the application of the principle to the instrumentality used in that case, he concedes that the principle is sustained both by reason and authority, and regards the question as settled in the future cases coming before the court by that decision.

Applying the principle to the record in this appeal, we find that his honor, without objection by plaintiff, submitted two issues—the first directed to the allegation that plaintiff was injured by the reckless and wanton conduct of defendant's agent; and second, whether at the time the assault was committed the agent was acting in the line of his duty, etc. It is true that the first issue concluded with the words, "As alleged in the complaint." When we refer to the complaint, we find that plaintiff sets out the transaction in detail and in several aspects. We think that, read in the light of his honor's instruction and the submission of the second issue, the finding by the jury upon the first issue referred to the manner in which the assault was committed; that is, recklessly and wantonly. In stating the contentions of the parties his honor calls attention to the testimony of the plaintiff and the contention of defendant that plaintiff was shot "at some

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other time and place, and was not shot by any agent of the defendant company." He concludes this part of the charge by saying that the burden is upon plaintiff to satisfy the jury that "what he says about it is true." His honor then defines a wanton, reckless act, saying: "You will notice that this issue presents to you the question as to whether this was a wanton act, and I undertake to tell you what in the eye of the law a wanton act is. If under the instructions I have given you, gentlemen, if your answer should be 'No,' it will not be necessary for you to answer the second and third issues." We quote the charge to show that the only question presented to the jury upon the first issue was whether the flagman shot plaintiff in a reckless and wanton manner. His honor recognized the fact that plaintiff must not only establish the allegation that defendant's servant assaulted him, but must go further, and show that the wanton, reckless assault was committed by the employee while acting in the scope of his employment and line of duty. The second issue was therefore consistent with the finding upon the first, and necessary to establish a complete cause of action. While the plaintiff's evidence was uncontradicted, it was the province of the jury to draw the inference whether the employee was acting in the scope of the employment. "The inquiry as to the scope of the servant's employment being for the jury (unless the act is manifestly out of the course of the servant's employment where a nonsuit is proper), the reported cases turn in nearly every instance either on the validity of the finding or on the question whether there is evidence for the jury." Beaven, Neg. 584. The question involved in the second issue might have been tried and determined on the first if his honor had seen proper to do so. This was done in *Pierce's Case*, 124 N. C. 83, 32 S. E. 399, 44 L. R. A. 316, where the court charged the jury that, if they found that the injury was inflicted by the servant in the course of his employment, to find the issue for the plaintiff. The plaintiff did not except to the submission of the second issue to the jury, or the instruction of the court. The question is, therefore, not presented whether as a matter of law his honor should have held that the servant was acting in the full scope of his employment. We have been unfortunate if we have not been able to make ourselves understood in this case. We do not hold nor is there any word in the opinion to justify the suggestion to the contrary that corporations or natural persons are privileged to shoot people. No such question is raised by any exception in the record. Nor was it suggested upon the argument. We simply hold that, when without objection or exception an issue is found by the jury, that the defendant servant was not acting within the scope of the employment when he committed the assault, the employer is not liable. This is elementary, and the courts "without variableness or shadow of turning" have uniformly so held.

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In *Palmer v. Railroad*, 131 N. C. 250, 42 S. E. 604, the opinion concludes with the words: "The employee must have been acting at the time within the scope of his employment on the defendant's car." The jury, not the court, found that in this case he was not so acting. We are unable to perceive how we can in the face of this finding without a single exception by the plaintiff do otherwise. No motion was made to set the verdict aside. This disposition of the appeal renders it unnecessary to consider the charge in regard to the character and measure of damages which could be awarded. The judgment must be reversed, with direction to enter judgment that defendant go without day, etc.

Reversed.

BROWN, J. (concurring). I concur in the opinion written for the court by Mr. Justice CONNOR, which to my mind is conclusive that the defendant company is not liable for the unwarranted and unauthorized act of its brakeman in shooting at the plaintiff. There is not a scintilla of evidence in the record that the brakeman shot at the plaintiff in an endeavor either to keep plaintiff off the train or to put him off after he was on. Upon all the evidence the act of the brakeman was neither authorized by the defendant or done in the discharge of the brakeman's duty to it. It was plainly a reckless, "devil may care," act, for the consequences of which the person who did it should be punished, and not his innocent employer who could not prevent it and did not ratify it.

In the *Stewart Case* in my opinion the company is held liable upon a well-defined ground, supported by most respectable authority, to the effect that a steam locomotive is such a dangerous instrumentality that the company is liable for the manner in which the engineer selected by the company uses it when running, it in the company's business. That principle is not involved in the case.

I do not understand, nor do I think any one else seriously believes, that railway or other corporations claim for their employees the privileges of the ancient nobility of France to shoot down innocent persons at will or to commit other lawless acts. I have so much respect for the great mass of railway employees that I do not think they merit any such severe censure. My experience has convinced me that they are very generally a most faithful, law-abiding, as well as highly respected, class of our industrial population. But now and then, as in all other callings, however great or however humble, some reckless individual will be found. When his lawless act is done in the discharge of his duty to his master, or when it is authorized or ratified by him, then the master is justly held to be liable for the damage inflicted, however innocent the master may be. But, when such act was not done in furtherance of the master's business, and was

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neither authorized nor ratified by him, but was the wanton, reckless, personal act of the servant which the master could neither foresee nor prevent and does not ratify, then it is neither law nor justice to hold the master responsible, and this applies to corporate as well as individual employers of labor.

Such has been the law of this and our mother country from time immemorial.

HYPES v. SOUTHERN RY. CO. et al.

(Supreme Court of South Carolina, April 9, 1909.)

[64 S. E. Rep. 395.]

Corporations—Torts—Liability.*—A corporation is liable for the tort of an agent acting within the general scope of his employment, without previous express authority or subsequent ratification, though the tort involves malice.

Corporations—Torts—Liability.†—A corporation is liable for malicious libel published, or for willful slander uttered, by its agent while acting within the scope of his employment, and in the actual performance of the duties of the corporation touching the matter in question, though the slanderous words were uttered without the knowledge, approval, consent, or ratification of the corporation.

Corporations—Torts—Liability.†—A railway company is liable for malicious slander of one employed by it as locomotive engineer, uttered by its general division superintendent, within the scope of his authority, and in the discharge of his duties, though it does not appear that it ratified the slander.

Appeal from Common Pleas Circuit Court of Greenville County; J. C. Klugh, Judge.

Action by C. E. Hypes against the Southern Railway Company and another. From a judgment overruling a demurrer to the complaint, defendant the Southern Railway Company appeals. Affirmed.

Cothran, Dean & Cothran, for appellant.

J. J. McSwain, for respondent

JONES, J. This is an action to recover damages, for alleged slander, against the defendant railway corporation and its general division superintendent. The defendant corporation interposed a demurrer to the the complaint that it failed to state facts

*See foot-notes appended to preceding case.

†For the authorities in this series on the question whether a railroad corporation may be held responsible for slander or libel, see foot-note appended to *Rivers v. Yazoo & M. V. R. Co.* (Miss.), 23 R. R. 363, 46 Am. & Eng. R. Cas., N S., 363.

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sufficient to constitute a cause of action, for the reason that a corporation cannot be held liable in damages for slander by one of its employees. The demurrer was overruled by Judge Klugh, and exception is now taken, in which it is contended that a corporation is not liable for slander uttered by one of its employees unless it affirmatively appear that such agent was expressly directed or authorized by the corporation to speak the words in question, of which there is no allegation in the complaint.

It appears that, some time previous to July 20, 1906, the plaintiff was a locomotive engineer of the defendant company, and at the end of May, 1906, turned in his time report showing the number of hours he had worked during the month. This claim was disallowed by defendant to the extent of \$37. Plaintiff, after some correspondence, had an interview with P. L. McManus, the superintendent of the defendant corporation, in the division headquarters in Greenville, S. C., in which they took up the matter of plaintiff's unpaid time. In this interview it is alleged that McManus as superintendent declared in loud tones, in the hearing of several persons within the room, and referring to plaintiff, "I am going to stop you fellows from stealing from the company," and called plaintiff a "thief" several times. The complaint further alleged that a letter was immediately written to each of the defendants setting out the slander and demanding an apology, and that the letter was never acknowledged or answered, and that, after notice of the wrong, the defendant corporation by its silence and acquiescence has approved and ratified the conduct of its said superintendent. It was further alleged: "That the action of the said P. L. McManus in accusing plaintiff of 'stealing' and of being a 'thief' was done within the scope of his authority, and in the discharge of his duties as superintendent as such; that he was acting for the Southern Railway Company and for its interests, as indicated by his words, 'I am going to stop you fellows from stealing from the company;' that the tort against the plaintiff was committed in the office of the said superintendent, while going over the books considering the question of plaintiff's time, which said P. L. McManus had full authority and power to settle; and, further, that the said defendant company has approved of the slander of its said agent and superintendent by failing to acknowledge said letter, and refusing to apologize to plaintiff for the insult offered him and the wrong and damage to his good name, and said injury was caused by the joint and concurrent act of the defendants." We think the demurrer was properly overruled.

It is established that corporations, as well as natural persons, are liable for the willful tort of an agent acting within the general scope of his employment, without previous express authority or subsequent ratification. *Rucker v. Smoke*, 37 S. C. 377, 16

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S. E. 40, 34 Am. St. Rep. 758; *Williams v. Tolbert*, 76 S. C. 217, 56 S. E. 908; *Schumpert v. Railway*, 65 S. C. 332, 43 S. E. 813, 95 Am. St. Rep. 802; *Gardner v. Railway*, 65 S. C. 342, 43 S. E. 816; *Riser v. Railway*, 67 S. C. 419, 46 S. E. 47; *Dagnall v. Railway*, 69 S. C. 115, 48 S. E. 97; *Fields v. Cotton Mills*, 77 S. C. 549, 58 S. E. 608, 11 L. R. A. (N. S.) 822, 122 Am. St. Rep. 593. The old doctrine that a corporation, having no mind, cannot be liable for acts of agents involving malice has been completely exploded in modern jurisprudence. While a corporation is non-personal in its formal legal entity, it represents natural persons, and must necessarily perform its duties through natural persons as agents; hence must spring the correlative responsibility for the acts of its agents within the scope of their employment. The liability of a corporation for malicious libel published by its agent in the course of his employment is generally recognized. *Philadelphia, etc. Ry. Co. v. Ouigley*, 21 How. 202, 16 L. Ed. 73; *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539, 27 Am. Rep. 293; *Bacon v. Michigan, etc., R. R. Co.*, 55 Mich. 224, 21 N. W. 324, 54 Am. Rep. 372; *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672; *Fogg v. Boston, etc., R. R. Co.*, 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583; *Missouri Pacific Ry. v. Richmond*, 73 Tex. 568, 11 S. W. 555, 4 L. R. A. 280, 15 Am. St. Rep. 794; 10 Cyc. 1215; 18 Ency. Law 1058. We do not regard the distinction between written and unwritten slander to be of sufficient importance to warrant the application of a different rule. The written slander is not always or necessarily more public than the spoken; and if it may indicate more deliberation, and hence warrant more easily the inference of malice, the difference is merely in degree, not in kind. It may otherwise appear that the slander was willful, as in this case under the demurrer.

This view is supported by a recent decision by the Supreme Court of Mississippi (*Rivers v. Yazoo & Mississippi Valley R. R. Co.*, 90 Miss. 196, 43 South. 471, 9 L. R. A. [N. S.] 931), which quotes from Lord Mansfield in *Maloney v. Bartley*, 3 Camp. 210, to the effect that there is no well-founded distinction between written and unwritten slander, and that the reasons given in the books for such a distinction are very insufficient. The Mississippi case held that a corporation is liable for slander spoken by its agent while acting within the scope of his employment, and in the actual performance of his duties of the corporation touching the matter in question, although, it did not appear that the slanderous words were uttered and published with the knowledge, approval, consent, or ratification of the corporation. In the case of *Singer Manufacturing Co. v. Taylor*, 150 Ala. 574, 43 South. 210, 9 L. R. A. (N. S.) 929, the Supreme Court of Alabama held that, in the absence of contract relation between the master and the person slandered, the master is not liable for

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a slander uttered by his servant which the master does not authorize or ratify. In the case at bar the complaint shows a contract relation between the corporation and the person slandered, and that the slander was in reference to a matter growing out of such relation, a dispute as to the correctness of plaintiff's claim for wages, a matter within the duty of the agent to adjust. In the case of *Behre v. National Cash Register Co.*, 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320, the court held that, while a corporation may make a libelous publication, it is not liable for oral slander by one of its servants, though within the scope of the duties of the agency, unless it affirmatively appear that the agent was expressly authorized by the corporation to speak the slanderous words. The reason assigned for this conclusion is that there can be no agency in slander. We see no good ground for distinguishing slander from other willful torts in this regard. In 10 Cyc. 1216, it is stated that the liability of a corporation for oral slander seems to stand on a different footing, and that the corporation is exonerated unless it authorized, approved, or ratified the act of the agent. To support the text the only case cited is *Redditt v. Singer Mfg. Co.*, 124 N. C. 100, 32 S. E. 292. An examination of that case, however, shows that a majority of the court were of the opinion that "a corporation is responsible for slanderous words uttered by its agents in the course and scope of such agents' employment, and in aid of the company's interests," but that under the circumstances of the case they concurred in holding the charge error because it excluded the right of possible justification. The case is really authority for our conclusion. The later case of *Sawyer v. Norfolk & S. B. Co.*, 142 N. C. 1, 54 S. E. 793, 115 Am. St. Rep. 716, more fully shows the position of the North Carolina court. In that case the court was unanimous in holding that a corporation may be liable for slander committed by its agent, and that the test of liability depended upon the question whether injury was committed by the authority of the master expressly conferred, or fairly implied from the nature of the employment and the duties incident thereto. In applying the principles stated the court held that a corporation was not liable for slander by its superintendent against one voluntarily in its office, seeking employment which the superintendent was authorized to give, but which was refused, and then the superintendent slandered the person in regard to his former work for the company. In determining the question of implied authority the court considered, not only the relation between the corporation and its agent, but between the corporation and the person slandered, holding that at the time of the slander there was no special relation of duty between the corporation and the plaintiff. We have adverted to the fact that in the case at bar the special relation between the corporation and the plaintiff is shown. In the case of *International*

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Text-Book Co. v. Heartt, 136 Fed. 132, 69 C. C. A. 127, the slander was uttered by the agent after he had left plaintiff's premises, and gone to another locality where he was not engaged in the performance of any duty under the terms of his employment. **Childs v. Bank**, 17 Mo. 213, cited by appellant, held the early view that a corporation is not capable of malice, but that conception is not now recognized in the law of Missouri, as appears by reference to **Gillett v. Missouri Valley R. Co.**, 55 Mo. 315, 17 Am. Rep. 653, and **Boogher v. Life Association**, 75 Mo. 319, 42 Am. Rep. 413.

Our conclusion is that the complaint shows facts from which it may be inferred that the slander in question was uttered within the course and scope of the agent's employment, and under implied authority of the master. This view sustains the order overruling the demurrer, and it is unnecessary to consider whether the facts stated also show subsequent ratification of the alleged slander by the master.

The judgment of the circuit court is affirmed.

STRAIN v. VICKSBURG, S. & P. RY. CO.

(Supreme Court of Louisiana, March 29, 1909.)

[49 So. Rep. 2.]

Carriers—Depot Platform—Obstruction—Negligence.—The carrier is not at fault in placing trunks on its platform at a depot, provided a sufficient passageway is left on the platform.

Carriers—Depot Platform—Obstruction—Negligence.—There was margin or space of 24 inches on the outer edge of a platform 4 feet 10 inches from the ground.

Carriers—Carriage of Passengers—Waiting Passenger—Care Required.—Due care must be exercised. The weight of the testimony is to the contrary.

Danger Apparent.—If there was danger, it was open and apparent, easily avoidable.

Two other persons about the time of the accident passed through the passageway provided without meeting with an accident.

(Syllabus by the Court.)

Appeal from Fourth Judicial District Court, Parish of Lincoln; Robert Brooks Dawkins, Judge.

Action by W. T. Strain against the Vicksburg, Shreveport & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Stubbs, Russell & Theus, for appellant.

Otis William Bullock and *John Williamson Hawthorn*, for appellee.

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BREAUX, C. J. This is a suit instituted by plaintiff against defendant for personal injuries received at Ruston at about 2 o'clock upon the afternoon of October 28, 1907.

Plaintiff is a young man, able-bodied and of medium size.

He claims \$2,668 damages.

The jury found for plaintiff and allowed him damages in the sum of \$450.

Defendant appealed.

Plaintiff answered the appeal, and asked for an increase of the judgment to \$1,500.

Plaintiff had left Dodson and caught the early morning train and came to Ruston. He intended to go from Ruston to Simboro. He had a round-trip ticket on the defendant road.

His complaint is that he fell from the platform of the railroad depot.

He averred that the depot was not such as the defendant should have had for the accommodation of its passengers. There were trunks placed on the platform; they obstructed the platform to a considerable extent. They were not placed one on the other, but each trunk was resting on the floor. There was a passageway on the outside of the platform between the end of the trunks and the outer edge of the platform.

After consulting the testimony, we find that the width of the passageway was 36 inches on the west side of the platform, and narrowed down to about 18 inches at the east end.

Where plaintiff fell, the passageway was about 24 inches in width. Plaintiff stepped toward the waiting room. He was preceded by an acquaintance in whose company he was at the time. On the way to the waiting room, he came to the trunk on the platform through the passageway in question.

The floor of the platform was in fairly good condition.

The platform was about 4 feet 10 inches from the ground.

Plaintiff stepped off or fell off from this platform to the ground against one of the rails of the track.

The track itself was parallel with the depot not far from the gallery or platform.

The trunks obstructed the platform about 5 or 6 feet. They were in height about 3 feet.

Plaintiff did not stumble on any obstruction in the floor of the platform. It never occurred to plaintiff that the place was unsafe before he fell.

Plaintiff, as a witness, testified that there was a slight shiver off of a plank, and when he fell it occurred to him that his foot turned off a little more readily at the edge and he fell; that he did not know that this was worthy of special mention.

Other witnesses testified that there was not even a shiver at the place he fell.

The defense of the railroad company is that it was free from

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any fault at all; that the plaintiff contributed to his own fall and injury.

Defendant also sets out that there was another way over the platform which plaintiff should have followed on his way to the waiting room.

The passageway:

It was not so narrow as to be dangerous. Two feet in width was not a dangerous width to a person passing on a platform not higher from the ground than this one was.

The defendant was not negligent in placing the trunks of its passengers on the platform. There was no reasonable cause for complaint on that ground.

We think that the passageway was wide enough. It is common experience that such a passageway is not dangerous.

We infer that the fall was owing to a moment's forgetfulness.

One of the witnesses testified that he saw plaintiff step beyond the outer edge as he fell.

It is true that the carrier owes protection to its passengers, whether on the train or at the depot waiting for a train. The protection due does not extend so far as rendering it incumbent upon the carrier to provide a larger passageway than two feet or over in width.

This accident is not one for which the defendant can be held liable. It does not appear that it was at fault in any way. The mere fact that there were trunks on the gallery would not justify us in allowing damages.

The findings of juries are generally entitled to some weight. But their findings are subject to review, and it follows that they may be at times reversed.

The facts are before us as they were before the jury. These facts do not convince us that the verdict was correct. The amount of itself weakens the verdict, it being only \$450. Had the jurors had absolute confidence in their finding, they would in all probability have rendered a judgment for a larger amount. The plaintiff in his fall on the rails of the track broke two of his ribs. He was confined to his bed for two weeks, suffered excruciating pain, was unable to move about for over a month, and to the date of the trial felt some of the effects of the fall.

Had the defendant been guilty of negligence, the amount of the jury's finding would have been entirely inadequate.

We have seen that the railroad company did not fail to provide a sufficient passageway, and that the proximate cause was not traced to the railroad but to the plaintiff himself.

The facts are such that we are constrained to set aside the verdict of the jury.

The law and the evidence being in favor of the defendant, and against plaintiff, it is ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, avoided, annulled, and reversed at plaintiff's costs in both courts.

CHICAGO, R. I. & P. RY. CO. *v.* WHITTEN.

(Supreme Court of Arkansas, May 17, 1909.)

[119 S. W. Rep. 835.]

Carriers—Carriage of Passengers—Questions for Jury—Baggage.

Whether any particular article may be deemed baggage for the loss of or injury to which the carrier will be liable may be properly submitted to the jury, in view of the nature of the journey and the circumstances and condition of the passenger.

Carriers—Carriage of Passengers—"Baggage."*—Baggage includes whatever the passenger takes with him for his own personal use and convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of his journey.

Carriers—Carriage of Passengers—Exemplary Damages.†—Negligent violation of the duties of a carrier to a passenger will not justify an award of exemplary damages, unless the carrier is guilty of willfulness, wantonness, or conscious indifference to consequences, from which malice will be inferred.

Words and Phrases—"Malice."—"Malice" is not necessarily personal hate, but is rather an intent and disposition to do a wrongful act greatly injurious to another.

Carriers—Carriage of Passengers—Damages—Mental Suffering.‡—In an action against a carrier for damage to a trunk and contents, plaintiff is not entitled to recover for mental suffering.

Appeal from Circuit Court, Pulaski County; Robert J. Lea, Judge.

Action by T. A. Whitten against the Chicago, Rock Island &

*For the authorities in this series on the question what does, and does not constitute a passenger's baggage, see foot-note of *Choctaw, etc., Co. v. Zwirtz* (Okla.), 8 R. R. R. 914, 31 Am. & Eng. R. Cas., N. S., 914, where all those preceding it are collected, last foot-note of *Brick v. Atlantic Coast Line R. Co.* (N. Car.), 26 R. R. R. 629, 49 Am. & Eng. R. Cas., N. S., 629; first foot-note of *Fleischman, Moris & Co. v. Southern Ry. Co.* (S. Car.), 26 R. R. R. 258, 49 Am. & Eng. R. Cas., N. S., 258; third head-note of *Park v. Southern Ry. Co.* (S. Car.), 25 R. R. R. 573, 48 Am. & Eng. R. Cas., N. S., 573; last foot-note of *Bergstrom v. Chicago, etc., R. Co.* (Iowa), 25 R. R. R. 140, 48 Am. & Eng. R. Cas., N. S., 140.

†For the authorities in this series on the right to recover punitive, or exemplary, damages for wrongs to passengers, see foot-note of *Steedman v. South Carolina, etc., Co.* (S. Car.), 9 R. R. R. 672, 32 Am. & Eng. R. Cas., N. S., 672, where all those preceding it are collected; last foot-note of *Taber v. Seaboard Air Line Ry.* (S. Car.), 31 R. R. R. 60, 54 Am. & Eng. R. Cas., N. S., 60; last foot-note of *Southern Ry. Co. v. Brewer* (Ky.), 29 R. R. R. 632, 52 Am. & Eng. R. Cas., N. S., 632; third head-note of *Illinois Cent. R. Co. v. Gortikov* (Miss.), 28 R. R. R. 650, 51 Am. & Eng. R. Cas., N. S., 650.

‡See second foot-note of *Strange v. Atlantic Coast Line R. Co.* (S. Car.), 27 R. R. R. 150, 50 Am. & Eng. R. Cas., N. S., 150.

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Pacific Railway Company for damage to a trunk and contents. Judgment for plaintiff for actual and exemplary damages, and defendant appeals. Affirmed if plaintiff remit the exemplary damages; otherwise reversed and remanded.

Thos. S. Buzbee, Jno. T. Hicks, and G. A. McConnell, for appellant.

T. G. Malloy and Palmer Danaher, for appellee.

FRAUENTHAL, J. The plaintiff, in company with two friends, took passage on one of defendant's trains on August 10, 1907, at Little Rock, Ark., for Cache River, for the purpose of spending several days fishing at and near the latter place. He purchased a ticket from defendant on that day which entitled him to carriage of himself and baggage from Little Rock to Cache River, two stations on defendant's line of railroad. He delivered to defendant at Little Rock his trunk, which contained clothing, quilts, seine, tent, some cooking utensils and groceries, and had same checked by defendant to Cache River. He alleged that, upon the arrival of the defendant's train at Cache River, he went to the baggage car and pointed out to defendant's employees his trunk, and requested them to put the same off, but that the employees "willfully, maliciously, negligently, and with a wanton disregard of plaintiff's rights insolently refused to there deliver the trunk, and carried it away on said train," and that thereby it caused him great bodily and mental suffering and inconvenience, that the trunk was not delivered to plaintiff until about two months later, and that the trunk and contents were greatly damaged. He asked for \$68 actual damages and \$1,000 exemplary damages. The defendant filed a demurrer to the complaint, which being overruled it filed an answer, in which it denied every material allegation of the complaint.

The only witnesses in the trial of the case were the plaintiff and his two companions. The plaintiff testified that he purchased from defendant a ticket and took passage on defendant's train, as set out in his complaint, with the intention of journeying to Cache River to spend several days fishing, and that he delivered to defendant his trunk with contents as set out in his complaint. He thereupon gave the following testimony as to what occurred upon his arrival at Cache River: "A. When the train got to Cache River, we got off the car, and went down and told them we wanted the trunk. Of course, they had the trunk checked there. We presented the check, and they threw out a trunk, and I told them that was not my trunk, and the baggage-man said 'Let me see your check,' and he said, 'No, it is wrong,' and I saw the conductor getting ready to give the signal to leave, and I said, 'Wait; we want to find our trunk, for it has everything we have in it.' And he just looked at me and gave a signal, and they went on down the road, and knew that it wasn't

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put off. He just simply ignored me. That is all. Q. How long did the train stay at Cache River after you told the baggageman that wasn't your trunk? A. I could not state how long it was, but I think about a minute. Q. Long enough to put off the trunk? It looked to me like they had plenty of time. There was no reason, only they simply didn't want to." His companions gave the following testimony as to what occurred upon their arrival at Cache River: "Q. I wish you would tell the jury what you did. A. We went to the baggageman and told him to put off the trunk, and he put off a trunk, and we told him it was not ours, and he never made any effort to change it or put ours off, and we finally compared our check with the train porter and the check that was on the trunk they put off was not the same as our check, and it seemed like he was going to force us to take it anyway, and he saw the checks were not the same, and by that time the train had been 'highballed' out, and we also told him that our trunk had all of our provisions and everything else in it, and he said he could not help it, and he said he had put off one trunk. Q. Did you go on the car and point out the trunk to the baggageman? A. Yes, sir. Q. Did he then refuse to put it off? A. Yes sir." The jury returned the following verdict: "We, the jury, find for the plaintiff and assess the actual damage at \$30, and further assess the sum of \$100 as punitive damages." From the judgment entered on this verdict, the defendant appeals to this court.

It is contended by the defendant that the above items carried by plaintiff in his trunk did not constitute baggage. And in the trial of the case it requested the court to instruct the jury, in substance, that if the plaintiff delivered to the defendant a trunk which contained goods, wares, or merchandise other than such articles as are usually carried by ordinary persons when traveling, and that plaintiff paid to defendant no additional charge for the carriage of said trunk, then the plaintiff would not be entitled to recover. The court refused to give this instruction. It is generally recognized by the courts that it is difficult to define with accuracy what will constitute baggage. It is ordinarily said to consist of articles of personal convenience and necessity. But it is at once evident that what may be considered convenient and necessary for one person might not be so for another, and that the articles which might be very necessary upon a journey for one purpose might not be so for another journey and for another purpose. In the case of *Kansas City, Ft. Scott & Memphis Railway Co. v. McGahey*, 63 Ark. 344, 38 S. W. 659, 36 L. R. A. 781, 58 Am. St. Rep. 111, this court has defined baggage to be: "Whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs either with reference to the immediate necessities or to the ultimate purposes

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of the journey." Little Rock & H. S. W. Rd. Co. v. Record, 74 Ark. 125, 85 S. W. 421, 109 Am. St. Rep. 67; Railway Co. v. Berry, 60 Ark. 433, 30 S. W. 764, 28 L. R. A. 501, 46 Am. St. Rep. 212. From this it will be seen that it is not necessary to constitute baggage that the articles which are being carried as such should be intended for the immediate necessities of the passenger on the journey, but they may also consist of articles that may be needed for the ultimate purposes of the journey. In fact, by a great majority of the courts, a very liberal construction has been placed upon the kind and character of the articles that will constitute baggage. In 3 Hutchinson on Carriers (3d Ed.) § 1254, it is said: "Although the articles which the passenger may claim as baggage may not be such as are usually carried by passengers as personal baggage, and may indeed be but rarely carried with the traveler, and may be wholly useless to him for the purposes of comfort or convenience on the journey, yet, if they be such as are appropriate or essential to the purposes of the journey, whether it be for pleasure or business, they may be considered as baggage, and the carrier may be held responsible for them as such, as in the case of the gun or the fishing apparatus of the sportsman, so often referred to in cases upon this subject as baggage under such circumstances."

The question as to whether any particular article may be deemed to be baggage may be properly submitted to a jury to determine in view of the nature of the journey and the circumstances and condition of the passenger. The court therefore did not err in refusing to give the several instructions asked for by the defendant relative to what constituted baggage under the circumstances of this case; and the court did not commit error in giving the following instruction on the part of plaintiff: "(1) Baggage includes whatever the passenger takes with him for his own personal use and convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of his journey."

It is contended by the defendant that the court erred in permitting the plaintiff to recover exemplary damages in this case; and it particularly contends that the court erred in giving the following instruction to the jury on the part of plaintiff: "If you find from the evidence that, upon arrival of defendant's train at Cache River, its agents or servants willfully, maliciously, or with such gross negligence as manifested a careless disregard of plaintiff's rights failed or refused to put plaintiff's trunk off said train, you may add such sum as you think proper by way of vindictive or exemplary damages as a punishment for the wrongful conduct of defendant's employees." The defendant in this case by contract had agreed to carry the baggage of plaintiff to Cache River, and there to deliver it to him. Ordinarily in actions

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upon contract the amount that can be recovered is limited to the actual damages caused by the breach; and this is usually the measure of the damages whether the breach occurred on account of a negligent failure or a willful refusal to perform the contract. But there are circumstances under which a carrier may violate its duty and obligation of carriage that may amount to a tort, and justify the award of punitive damages. Under the obligation which is imposed by the law upon common carriers to protect their passengers from insult and indignities and injuries, the facts and circumstances of a violation of that duty, whether technically a violation of a contract or a tort, may justify exemplary damages by way of example. And there may be facts and circumstances shown in the treatment of a passenger by the employees of the common carrier which indicate a violence towards him or a malice and intent to injure which might justify the giving of punitive damages. *Fordyce v. Nix*, 58 Ark. 136, 23 S. W. 967; *Little Rock Railway & Electric Co. v. Goerner*, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A. (N. S.) 97.

But exemplary damages will not be allowed on account of an injury growing out of a mistake or ignorance or negligence, no matter how gross the negligence may be. The rule relative to the right of recovery of exemplary damages from a common carrier for a wrongful or negligent violation of its obligations and duties to a passenger has been formulated by this court in the following language: "Negligence, however gross, will not justify a verdict for exemplary damages unless the negligent party is guilty of willfulness, wantonness, or conscious indifference to consequences from which malice will be inferred." *Railway v. Hall*, 53 Ark. 7, 13 S. W. 138; *St. L., I. M. & S. Ry. Co. v. Wilson*, 70 Ark. 136, 66 S. W. 661, 91 Am. St. Rep. 74; *Ark. & La. Ry. Co. v. Stroude*, 77 Ark. 109, 91 S. W. 18, 113, Am. St. Rep. 130; *C. O. & G. Rd. Co. v. Cantwell*, 78 Ark. 331, 95 S. W. 771; *St. L., I. M. & S. Ry. Co. v. Dysart* (Ark.) 116 S. W. 224; *Greer v. White* (Ark.) 118 S. W. 258. Here the motive of the injuring party becomes material. Mere negligence, indifference, or careless disregard of the rights of others is not sufficient upon which to base a recovery for exemplary damages. The acts must be such as to evince malice. It is true that in law malice is not necessarily personal hate. It is rather an intent and disposition to do a wrongful act greatly injurious to another. But it is more than gross negligence that might indicate a careless disregard of the rights of others. 2 *Sutherland on Damages*, 1101.

In the above instruction given on the part of plaintiff it is provided that exemplary damages might be awarded in event the agents or servants of defendant failed or refused to put plaintiff's trunk off with such gross negligence as manifested a careless disregard of plaintiff's rights. Therefore the instruction

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was erroneous and prejudicial. The facts and circumstances in this case may be sufficient to warrant a jury in awarding exemplary damages. Although we may be of opinion that the testimony only indicates acts of negligence and great carelessness on the part of the defendant's employees, nevertheless we would not feel authorized to disturb the verdict of the jury awarding such damages under proper instructions. The evidence should be submitted to the jury for them to decide whether these negligent employees were "guilty of willfulness, wantonness, or conscious indifference to consequences from which malice will be inferred;" and this must be proved by evidence before any exemplary damages can be awarded in this case. Under the circumstances of this case, we do not think that any further proof of actual damages is necessary if the plaintiff is otherwise entitled to exemplary damages; but we are of opinion that under the facts of this case, and because of no physical injury, the plaintiff is not entitled to recover any damages for alleged mental suffering as asked for in his complaint. *St. L., I. M. & S. Ry. Co. v. Taylor*, 84 Ark. 42, 104 S. W. 551.

It appears from the testimony that the baggage was returned to plaintiff greatly damaged. The evidence is sufficient to sustain the verdict of the jury for the actual damages and the amount thereof, but error was committed by the court in giving the instruction No. 3 on the part of plaintiff relative to exemplary damages. Therefore, if the plaintiff will within 15 days remit the amount of the exemplary damages, the judgment will be affirmed. But, inasmuch as justice will be more evenly meted out by the submission and trial of both elements of damages, rather than by the submission and trial of the element of exemplary damages alone, in the event that the plaintiff is not advised to enter the above remittitur, the judgment will be reversed and the cause remanded for a new trial.

PEOPLE v. DETROIT UNITED RY.

(Supreme Court of Michigan, Nov. 2, 1908.)

[118 N. W. Rep. 9.]

Street Railroads—Regulation—Duty to Operate—Violation of Ordinance.—Detroit city ordinance requires street cars to be run through to the end of their route, except in cases of delay due to causes beyond control, when cars may be turned to restore service in the opposite direction, provided there is a car following in the same block and going through to the end of the route. Held that, in a case within the exception, the fact that the company had idle cars and employees in the barn where the turn was made did not affect their right to turn the car before reaching the end of the route.

Street Railroads—Regulations—Violations—Prosecutions.—A prosecution of a street railway company for violating an ordinance requiring that cars be run through to the end of the respective routes, except in specified cases, is a prosecution in the name of the people, and is not a civil proceeding on behalf of a passenger.

Carriers—Carriage of Passengers—Transfers.*—Street car passengers must secure transfers as evidence of payment of fares, and a conductor of one car need not accept their statement that they have paid fare to the conductor of another car.

Street Railroads—Regulation—Ordinances—Violations.—A car delayed by the breaking down of another car was turned to restore service in the opposite direction while there was a car in the same block following, and going through to the end of the route. Passengers on the car insisted on their right to remain, and they did not receive transfers to the car following. There was nothing to show that the passengers knew of a conversation between the conductors of the two cars as to the transfer of the passengers, or that they knew of the practice of the company in such case as to the transfer of passengers from one car to another. Held to show a violation of a city ordinance requiring cars to be operated through to the end of the routes, except in specified cases, in which transfers shall be given to passengers entitling them to transportation to their destination.

*For the authorities in this series on the subject of street railway transfers, see foot-note appended to *Kelly v. New York City Ry. Co.* (N. Y.), 30 R. R. R. 368, 53 Am. & Eng. R. Cas., N. S., 368; foot-note appended to *Bull v. New York City Ry. Co.* (N. Y.), 30 R. R. R. 154, 53 Am. & Eng. R. Cas., N. S., 154.

For the authorities in this series on the subject of the duty of conductors to respect explanations of passenger as to cause of failure to have tickets or the proper tickets, see second foot-note appended to *Shelton v. Erie R. Co.* (N. J.), 25 R. R. R. 70, 48 Am. & Eng. R. Cas., N. S., 70; last foot-note appended to *Norton v. Consolidated Ry. Co.* (Conn.), 24 R. R. R. 437, 47 Am. & Eng. R. Cas., N. S., 437.

People v. Detroit United Ry

Certiorari to Recorder's Court of Detroit; William F. Connolly, Judge.

The Detroit United Railway was convicted of violating an ordinance of the city of Detroit, and brings certiorari. Affirmed.

Argued before GRANT, C. J., and BLAIR, HOOKER, MOORE, and McALVAY, JJ.

Brennan, Donnelly & Van De Mark (John J. Speed, of counsel), for appellant.

Bernard F. Weadock (P. J. M. Hally, of counsel), for the People.

BLAIR, J. Defendant was convicted in the recorder's court of the city of Detroit of violating the provisions of section 19 of chapter 165 of the Compiled Ordinances of 1904. The complaint and the section of the ordinance in question are as follows:

"Harry J. Lowther, being first duly sworn, makes complaint, and says that at the city of Detroit, aforesaid, on the 5th day of February, A. D. 1908, within the corporate lines of said city, to wit, on the Sherman street car line, east bound, at the hour of 6:40 p. m., one Detroit United Railway, a Michigan corporation, operating street cars on said line did then and there unlawfully and willfully fail and neglect to operate a regular passenger car, to wit, car No. 1298, through to the end of the route, there being at the time aforesaid no block or delay due to causes beyond control, said car having passengers on board, and did then and there unlawfully and willfully turn said car in the opposite direction at the corner of Concord and Kercheval, the same not being the end of said route, and there being no car following going through to the end of the route in the same block, and the same being done without giving transfers to all passengers therein, entitling them to transportation to their destination, to the evil example of all others in the like case offending, and contrary to the ordinances of said city, in such case made and provided. Sections 10, 19, chapter 165, pages 283-288 of the Compiled Ordinances of the city of Detroit for the year 1904."

"Sec. 19. All regular passenger cars operated upon any of the routes named herein shall be run through to the ends of the respective routes, provided that in cases of blockades and delays due to causes beyond the control, cars may be turned for the purpose of restoring service in the opposite direction, provided, however, that cars having passengers on board may not be turned unless a car following and going through to the end of the route is in the same block, and provided transfers shall be given to all passengers thereon entitling them to transportation to their destination."

The complaining witness testified that on the day in question he boarded a Sherman street car marked "Limits:" "It was

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6:40 when we got to the barn. I paid my fare by ticket. The car ran through all right, nothing wrong with it, and, reaching the barn at the corner of Concord and Kercheval avenue, the car was pretty well crowded. Every seat was taken, and people standing along the aisle, and we were simply commanded to change cars. The conductor shouted out, 'Change cars.' No transfers were given. Q. Did they want you to take the car ahead? A. I could not say. I didn't hear anything said about it. I was simply ordered to change cars. I did not notice whether there was a 'Limits' car behind us. I have been thrown out there so often and found none that I simply declined to get off. After that, they turned the car into the barn, and told us we would have to get out. They boarded a lot of street car employees—I counted three on the back of the car—and sent us downtown again. I went up to the corner, almost the corner of Mt. Elliott and the street that turns down going west, and then I was put off forcibly. There were three of us forcibly ejected. It was raining at the time I was put off the car. There were 13, I think, that went back downtown and refused to get off. Q. Those are the ones you invited to stay to make a lawsuit? A. Yes; to test this business of throwing us off every night. The car went into the barn. I did not get off. Possibly they took air in the barn that night. This car then started back downtown. I do not know what became of the passengers that got off the car there. I did not attempt to ascertain whether there was another car there waiting for us or not. I had no transfer to get on another car. Q. There was a car waiting? A. I know; but I couldn't tell whether I would be thrown off there, if I had nothing to show that I paid my fare. Q. Anyway you didn't get off the car to see? A. No, sir. Q. You didn't get off because you intended to make this a test case? A. Because I had been thrown off so many times." It appears from the testimony that the car in question had been sent out to take the place of a crippled car. "We were going west in the first place, and we had a car 121, and one of the machines gave out. We had to turn the car in west bound, which held us and made us very late, made us 12 minutes late at the west end and we had to make it up. The rails were bad. It was hard to stop the cars, and we got downtown four minutes late. I got awful late when I got to the barns. Eight minutes late at the barn, and the carhouse foreman told us to turn, which we had to do to get on time. It takes to run from there to the end of the line, to the limits, nine minutes, and unload the load. The next 'Limits' cars were right back of us. When the foreman told us to turn, I told the passengers to take the car right back of it. The car was standing right there. It followed us all the way up to the barn, pretty near together. * * * Q. Did you ever offer transfers when you asked them to get out? A. Yes; if there is no car back of

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us, but the car was right back of us, and I told the conductor on the car that I had not given them transfers. It wasn't necessary, to transfer them. Only took up time to give them transfers. * * * After we had turned at the barn, we were pretty near on time. It takes to run from Kercheval barn out to the end of the line nine minutes. Nine minutes to run one way and nine minutes to go back. That is the running time. * * * It had been snowing and raining. The track was covered with ice and snow. Rigs passing along the street piled the snow on the track, made it heavy for the cars to run. It was difficult to make them anywhere near on time. It had been all day." It further appeared from the testimony that 13 or 14 day run cars were in the barn, and that several conductors and motormen who had finished their day's work were still at the barn, and that they were entitled to pay for all the time they worked.

It is contended by counsel for appellant that "the practice in such cases of informing the conductor of the car to which the change is made that no transfer tickets have been issued and for him not to collect fares is in fact a transfer under the ordinance. After the order by the foreman to return the car is given, to punch and go through the car distributing the transfer tickets would take up some time. This distribution would necessarily have to be made before the announcement to 'change cars' is made to passengers who immediately thereupon would commence to leave the car, and the issuing of these transfers would serve no useful purpose whatever." This is the only point presented by the brief of counsel for appellant. Counsel for the people contend that the practice followed by the conductor was not a compliance with the provision for transfers, and further insist "that, under this ordinance, cars may not be turned except in the cases enumerated, and then only when necessary 'to restore service in the opposite direction.' When the car in question reached the Concord barn, it was peremptorily ordered turned with its 40 passengers when 13 or 14 cars and street car men to operate them were available for use in the car barn. * * * We contend under these conditions that it was not necessary to turn car 1298 in order to restore service in the opposite direction. It would have taken the car 18 minutes to have run from the barn to the end of the route and return, and the men operating it would have been paid for 'every minute they worked.' The cost to the company would have been trivial; the convenience and comfort of the passengers great. These 40 passengers were entitled to ride to their destination without a change of cars. It was the duty of the company to send them on this car to their destination. A car from the barn could have been sent west with the crew of 1298, and the company would not have been incommoded in the least. The service would have remained un-

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impaired, and the convenience and comfort of the passengers undisturbed." The undisputed testimony shows that car No. 1298 was delayed from "causes beyond control," viz., the breaking down of car No. 121 and the action of the elements, and that the car was turned "for the purpose of restoring service in the opposite direction." It further appears that, when the car was turned, there was a car in the same block "following and going through to the end of the route." So far, therefore, as these conditions precedent to the right to turn the car were concerned, they were literally fulfilled. We do not think that the fact that the company had idle cars in the barn and men to operate them affected the company's duty under the ordinance. The provisions of the ordinance obviously contemplate that the passengers on the belated car shall continue their journey on the following car in the same block. It is evident, however, that the respondent did not comply with the letter of the law as to transfers, compliance with which was also a condition precedent to the right to turn the car, and in our opinion it did not comply with the spirit of the law. This is not a civil proceeding on behalf of a passenger, but a prosecution in the name of the people. It has been repeatedly held by this court that it is the duty of passengers to secure evidence of payment of fares, and that a conductor is under no legal obligation to accept their statements that they have paid such fares. *Mahoney v. Railway Co.*, 93 Mich. 612, 53 N. W. 793, 18 L. R. A. 335, 32 Am. St. Rep. 528; *Brown v. Railway Co.*, 130 Mich. 483, 90 N. W. 290; *Brown v. Railway Co.*, 134 Mich. 591, 96 N. W. 925; *Vining v. Railway*, 122 Mich. 248, 80 N. W. 1080. The ordinance manifestly intended that the usual paper transfers should be delivered to the passengers, as conclusive evidence of their rights, before the company should have the right to turn the car. If the consent of the passengers that the company might violate the provisions of the ordinance would furnish a complete protection to it for such violation, certainly such consent must be shown or facts from which it would be necessarily implied. While the passengers did not demand transfers and perhaps did not remain on the car for that reason, still they were entitled to them, and, before the conductor could legally insist upon their leaving the car and taking the following car, it was his duty to comply with the provision for transfers. The passengers were insisting upon their right to remain upon this car and go through to their destination and they waived none of their rights. There is no evidence that they knew of the conversation between the two conductors as to transfers, or that all of them knew of the practice of the company to only give transfers when there was no car following, in which case the ordinance expressly prohibited the turning of the car. The complaining witness testified: "I couldn't tell whether I would be thrown off there, if

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I had nothing to show I had paid my fare." The company could not compel the passengers to accept its practice in place of the ordinance method. They were entitled to the printed evidence of their right which the ordinance required.

Judgment affirmed.

SULLIVAN *et al.* v. SEATTLE ELECTRIC CO.

(Supreme Court of Washington, Nov. 14, 1908.)

[97 Pac. Rep. 1109.]

Death—Actions for Death—Cause of Death—Evidence—Admissibility.—In an action for death by wrongful act, the report of the coroner to the county auditor, under Laws 1891, p. 190, c. 98, § 6, is inadmissible to prove the cause of death.

Carriers—Injuries to Passengers—Evidence—Admissibility.—In an action for the death of a street car passenger permitted to alight at a dangerous place while intoxicated, proof of the conduct of decedent while a passenger on the car, including his attempt to alight therefrom, was admissible to show his condition and the trainmen's knowledge thereof, but evidence of the condition of the streets where he attempted to alight, but was prevented by the trainmen, was inadmissible.

Evidence—Declarations—Admissibility.—The declarations of a bystander, in no manner connected with the principal transaction must, to be admissible in evidence, relate to matters of fact which he might testify to if called as a witness.

Evidence—Declarations—Admissibility.—In an action for the death of a street car passenger permitted to alight at a dangerous place while intoxicated, the exclamations of another passenger, made at about the time decedent left the car, that it was murder to let decedent alight at that place was inadmissible, being the expression of a mere opinion.

Carriers—Injuries to Passengers—Evidence—Admissibility.—In an action for the death of a street car passenger permitted to alight at a dangerous place while intoxicated, evidence that, when decedent boarded the car, he was bloody about the face and muddy was admissible to show his condition, and to attract the attention of the trainmen to his condition.

Trial—Argument of Counsel—Improper Argument.—It is improper to permit counsel, in his argument to the jury, to read testimony taken at another trial, where such testimony had not been received in evidence.

Trial—Argument of Counsel—Improper Argument.—In an action for the death of a street car passenger permitted to alight at a dangerous place while intoxicated, the argument of counsel for plaintiff

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that decedent was a man of good habits; that if he had not been, defendant would have raked the land over to show that he was a drunkard—was improper; the general character of decedent not being in issue, and it not being competent for defendant to prove his general character for sobriety.

Carriers—Carriage of Passengers—Care of Passengers.—A street car conductor may presume that every passenger is sane and sober until he has actual notice to the contrary, and he is not required to make an examination to ascertain the condition of a passenger, and the doctrine of imputed notice is inapplicable.

Carriers—Carriage of Passengers—Care of Passengers.*—Where a passenger is in need of special assistance, either from sickness or other misfortune, and the fact is known to the trainmen, they must render such assistance.

Appeal and Error—Law of the Case.—The opinion of the Supreme Court on appeal is the law of the case on a subsequent trial.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Anna Sullivan and others, by their guardian ad litem Anna Sullivan, against the Seattle Electric Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

James B. Howe and R. G. Sharpe, for appellant.

John E. Humphries and George B. Cole, for respondents.

RUDKIN, J. This action was instituted by the widow and minor children of David Sullivan, deceased, to recover damages for his death, which is alleged to have been caused by the wrongful act or neglect of the defendant. The case was before this court on a former appeal, where a full statement of the facts will be found. *Sullivan v. Seattle Electric Co.*, 44 Wash. 53, 86 Pac. 786. On a retrial of the action the plaintiffs had judgment for the sum of \$3,000, and the defendant has appealed.

In the course of the trial the respondents offered in evidence the report of the deputy coroner to the county auditor, made pursuant to section 6, Act March 7, 1891 (Laws 1891, p. 190, c. 98), for the purpose of proving the cause of death. The appellant challenged the competency of this report. But its objection was overruled, and this ruling is the first error assigned. It was formerly held that the record of a coroner's inquest on a dead body was competent, but not conclusive, evidence of the cause of death in all civil actions, because it was the result of an in-

*See foot-note appended to *Horne v. Southern Ry.* (S. Car.), 27 R. R. 316, 50 Am. & Eng. R. Cas., N. S., 316; *South Covington, etc., Ry. Co. v. Quinn* (Ky.), 30 R. R. 508, 53 Am. & Eng. R. Cas., N. S., 508 (children traveling alone.)

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quiry, made under competent public authority, to ascertain matters of public interest and concern. 1 Greenleaf, § 556. This rule still prevails in a few jurisdictions, but the great weight of modern authority is against it. *Memphis & C. R. Co. v. Womack*, 84 Ala. 149, 4 South. 618; *Germania Life Ins. Co. v. Lewin*, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215; *In re Dolbeer*, 149 Cal. 227, 86 Pac. 695; *Central Ry. Co. v. Moore*, 61 Ga. 151; *Insurance Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277; *Insurance Co. v. Kaiser*, 115 Ky. 539, 74 S. W. 203; *Wasey v. Insurance Co.*, 126 Mich. 119, 85 N. W. 459; *State v. Cecil Co.*, 54 Md. 426; *Louis v. Ins. Co.*, 58 App. Div. 137, 68 N. Y. S. 683; *Insurance Co. v. Schmidt*, 40 Ohio St. 112; *Cox v. Royal Tribe of Joseph*, 42 Or. 365, 71 Pac. 73, 60 L. R. A. 620, 95 Am. St. Rep. 752; *Insurance Co. v. Milward*, 118 Ky. 716, 82 S. W. 364, 68 L. R. A. 285; *Kane v. K. of M. of W.*, 113 Mo. App. 104, 87 S. W. 547; *Boehme v. W. of W.*, 98 Tex. 376, 84 S. W. 422; *Kinney v. Brotherhood*, 15 N. D. 21, 106 N. W. 44; *Chambers v. M. W. of A.*, 18 S. D. 173, 99 N. W. 1107; *Wigmore on Evidence*, § 1671. The rule excluding such records prevails indiscriminately in actions on insurance policies, and in actions to recover damages for death by wrongful act, as will appear from an examination of the cases cited. The reason for the change in the rule is not far to seek. "By the ancient law such high credit was given to a coroner's inquest that the judge would not receive a verdict acquitting a person of the death of a man found against the accused by the coroner's inquest, unless the jury finding such acquittal had also found what other person did the act, or by what other means the party came to his death. 2 Bac. Abr. tit. 'Coroner.' This rule does not now obtain anywhere, and the natural inquiry is, What remnants of it ought to remain? The inquiry into the cause of death cannot, under our law, in and of itself, establish the status of any one or of any property. * * * At the ancient common law, when the jury found that a person had committed suicide, ignominious burial followed. To this extent the inquest established the status of the deceased, but, under our practice, nothing follows upon the verdict, except in case it is found that a crime has been committed. Why, then, should a stranger to the proceeding be bound by the verdict? Why should it be evidence against a stranger of the cause of his death? We cannot see any well-grounded reason why such a verdict be either conclusive or evidence against a stranger to the proceeding. *Wasey v. Insurance Co.*, *supra*." The reasons for excluding this class of testimony are thus stated by the court, in *Germania Life Insurance Co. v. Lewin*, *supra*: "In case of death under suspicious circumstances, or resulting from accident, the rule permitting inquisitions to be used in evidence would result in a race and scramble to secure a favorable coroner's verdict that

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would influence, and perhaps control, in case suit should be instituted against life insurance companies upon policies of insurance, and in cases of accidents occurring as the result of negligence on the part of corporations operating railways, street car lines, mining for coal or the precious metals, etc. Law writers of late have frequently animadverted upon the carelessness with which such inquests are frequently conducted, and to allow inquisitions to be used in a suit between private parties upon a cause of action growing out of the death of the deceased, as in this case; would be to introduce an element of uncertainty into the practice which, we think, would be contrary to public policy, and pernicious in the extreme; and for this reason we conclude, upon careful consideration, that the safer and better rule is to exclude such inquisitions."

We have thus far considered the report of the coroner as if it were entitled to the same degree of credit as the record of an inquest, because the parties have so treated it; but, in our opinion, the report does not stand on as high a plain as the formal record. It is simply a report, made to the auditor by the coroner as a part of the vital statistics of the state, under the provisions of the act creating the State Board of Health; and, as said by the court in *Sovereign Camp v. Grandon*, 64 Neb. 39, 89 N. W. 448: "It is a mere police regulation, and is not intended for supplying the public at large with information upon which reliance may be placed in the business affairs of the community. We do not think the record is of such a character as to entitle it to be received in evidence, as affecting the interest of a party to a litigation."

The respondents offered testimony tending to show that the deceased attempted to get off the car at a point where the streets were graded and level, but was restrained from so doing by the servants of the appellant. This testimony was admitted over objection, but the court afterwards charged the jury that they could only consider it in determining the condition of the deceased. Doubtless the entire conduct of the deceased while a passenger on the car might be given in evidence for the purpose of showing his condition, and the knowledge that the appellant or its servants had of that condition, but the condition of the streets where the decedent first attempted to leave the car had no bearing upon that question. The jury might well infer from this testimony that the appellant was in the wrong in restraining the deceased from leaving the car at a safe and proper place, and how for this fact may have influenced or entered into the general verdict we do not know. The testimony bearing upon the character of the streets where the deceased attempted to leave the car should have been excluded.

Three witnesses, called by the respondents, were permitted to testify, over objection, that at or about the time the deceased

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left the car a woman passenger in the same car got up, or jumped up, and exclaimed that "it was murder," or, "looked like murder," to let the deceased off at that place. The appellant assails the rulings of the court in admitting this testimony on three grounds: First, because the exclamation was not made at the time the deceased left the car; second, because the exclamation was made by a passenger or bystander in no way connected with the principal transaction; and, third, because the exclamation was a mere expression of opinion. We will pass over the first two grounds of objection, as they are not necessarily involved in this case, and, so far as we are at present advised, will not arise on a retrial. Assuming, without deciding, that exclamations of a mere bystander, in no manner connected with the principal transaction, are admissible in evidence, yet such exclamations must relate to matters of fact which the party might properly testify to if called as a witness, and not to mere matters of opinion. To hold otherwise would place exclamations above sworn testimony. If the exclamation in question related to the principal transaction at all, it was nothing more than the expression of an opinion on the part of this woman that, if a person in the condition of the deceased were permitted to get off the car at that point, he would meet his death. It must be perfectly apparent to any one that if called as a witness, this woman could give expression to no such opinion, and if her opinion found its way into the records inadvertently, it would be forthwith stricken. *Hughes v. Railroad Co.*, 104 Ky. 774, 48 S. W. 671; *Allen v. State*, 111 Ala. 80, 20 South. 490; *State v. Ramsey*, 48 La. Ann. 1407, 20 South. 904; *Kaelin v. Commonwealth*, 84 Ky. 354, 1 S. W. 594; *De Walt v. Railway Co.*, 22 Tex. Civ. App. 403, 55 S. W. 534.

One of the witnesses for the respondents was permitted to testify, over objection, that when the deceased got on the car, he was all muddy and bloody about the face. We think this testimony had some tendency to show the condition of the deceased, and to attract the attention of the servants of the appellant to his condition, and that the testimony was proper for that purpose.

It is next objected that counsel for the respondents was permitted to read portions of the testimony taken at another trial in his argument to the jury. Of course it would be improper to permit such testimony to be read, unless it was also offered at the second trial, but the question will not arise again, and we will not further discuss or consider it. In his closing argument to the jury counsel for the respondents further said concerning the deceased: "He was a man of good habits, gentlemen. If he had not been, they would have raked this land over with a fine tooth comb to show this man was a drunkard." The general character of the deceased was not an issue in the case.

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It would not have been competent for the appellant to offer proof of his general character for sobriety, and counsel should not have been permitted to refer to the absence of such testimony in argument.

The following instruction to the jury was duly excepted to and the giving of the instruction is assigned as error: "If you find from the evidence that the said David Sullivan was in such a state of intoxication as to be unable to care for himself, and that the servants of the defendant in charge of the car upon which he was a passenger knew that he was in such condition, or by the exercise of reasonable care—that is, such care as a reasonably prudent person, engaged in like occupation, would ordinarily exercise under similar circumstances to ascertain the condition of a passenger—should have known that he was in such an intoxicated condition as to be unable to care for himself, then it was the duty of the servant of the defendant company operating said car to take such precaution for his safety as his condition required under all the surrounding circumstances." This instruction is erroneous. A conductor has a right to presume that every passenger entering his car is both sane and sober until he has actual notice to the contrary. He is not compelled to make a mental or physical examination to ascertain his condition, and the doctrine of imputed or implied notice has no application to such a case. "If a passenger voluntarily becomes intoxicated, the law does not impose the duty on the common carrier to place a guard over such passenger to prevent him from injuring himself in a place of danger. If a passenger, however, while in such condition as averred, does place himself in a place of peril, then, before the company can be held liable, if an injury results therefrom, it must be proven that the agents or servants operating the train knew that fact—not that they should have known it because of any duty by law imposed on the company to watch such passengers—but the actual fact of such perilous position must be brought home to the knowledge of the servants operating such train. The company was not bound to have its servants at the rear platform of the coach on which Carr was sitting at Mulkeytown, for the reason that it owed him no such duty, as he had not indicated any intention of alighting there, and in fact he did not intend to do so." *St. Louis, etc., Ry. Co. v. Carr*, 47 Ill. App. 353. "We think, however, if a passenger is in need of special assistance, either from sickness or other misfortune, and this fact is known to the employees of the carrier, it is their duty to render it; but they are not required to anticipate such wants or needs. The trial court, therefore, erred by inserting into the instructions given to the jury the idea that it was incumbent upon the employees of the appellant to observe the condition of the passengers in order to see whether or not they needed assistance. This thought is em-

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braced in the use of the expression 'or was, apparent' in the instructions, after stating the duty of the employees of appellant if appellee's health was known to them. As said before, if the employee of the railroad knew that the appellee was in feeble health and needed assistance, it was their duty to render her such reasonable help as lay in their power, in order that she might alight from the car in safety. But they owed her no duty of observation to ascertain her condition, and therefore the expression 'or was apparent' should have been omitted." *Illinois Central Ry. Co. v. Cruse*, 123 Ky. 463, 96 S. W. 821, 8 L. R. A. (N. S.) 299. See, also, *Strand v. Ry. Co.*, 67 Mich. 380, 34 N. W. 712.

Other errors are assigned in the giving and refusing of instructions, but we think these questions are fully covered by our former opinion. As there stated, the issues in this case are: First, was the deceased intoxicated; second, did the servants of the appellant have actual notice of his condition; third, was the place where the deceased was permitted to alight from the car a reasonably safe place to land a person in his condition; and, fourth, was the act of the appellant or its servants in suffering and permitting the deceased to leave the car at that particular time and place, and in his then condition, the natural and approximate cause of his death? If the jury should find all these issues in favor of the respondents, they would be entitled to a verdict, and the mere fact that the deceased fell into the lake from the platform or trestle by reason of his intoxication—if he did so fall—would not of itself preclude a recovery, as the appellant was bound to anticipate such negligence on his part. Such we believe to be the law as laid down in the former opinion, and that opinion is the law of this case.

The judgment of the court below is reversed, and the cause is remanded for a new trial.

FULLERTON, DUNBAR, CROW, and MOUNT, JJ., concur.

ST. LOUIS, I. M. & S. RY. CO. v. GRIMSLEY.

(Supreme Court of Arkansas, March 29, 1909.)

[117 S. W. Rep. 1064.]

Carriers—Contributory Negligence—Necessity of Pleading.*—A carrier, to avail itself of contributory negligence of one sustaining injuries while waiting at a depot to see passengers off, must plead such negligence.

Carriers—Injuries to Person Accompanying Passengers—Contributory Negligence—Question for Jury.—In an action for injuries sustained by falling through a defective seat in defendant's depot while waiting to see passengers off, whether plaintiff was guilty of contributory negligence held for the jury.

Trial—Refusing Instructions Already Given—Contributory Negligence.—Where, in an action for injuries by falling through a defective seat while waiting to see passengers off, the court instructed that plaintiff must have used ordinary care, and another instruction charged on contributory negligence, a requested instruction that it was plaintiff's duty, before sitting, to look at the seat, and if he did not do so, or the defect was obvious, he was negligent, was properly refused.

Carriers—Injuries to Passengers—Condition of Waiting Room—Carrier's Duty.†—It is a railroad company's duty to exercise ordinary care to keep its waiting room in a safe condition, so that it was inaccurate to instruct that a carrier must keep its waiting room in a reasonably safe condition.

Carriers—Injuries to Person Accompanying Passengers—Instructions.—In an action against a carrier for injuries sustained by a person accompanying a passenger by falling through a defective seat in defendant's waiting room, instructions held to sufficiently present the question of defendant's negligence.

Carriers—Liability to Persons Accompanying Passengers.‡—A carrier is bound to exercise ordinary care to keep its waiting room in a reasonably safe condition for the benefit of those going there to meet and assist incoming, or to aid outgoing, passengers for their convenience, comfort, and safety; such persons being implied licensees.

*For the authorities in this series on the question whether contributory negligence must be pleaded, see last foot-note appended to *Cahill v. Stone & Co.* (Cal.), 29 R. R. R. 762, 52 Am. & Eng. R. Cas., N. S., 762; third foot-note appended to *Smith v. Ogden & N. W. R. Co.* (Utah), 27 R. R. R. 487, 50 Am. & Eng. R. Cas., N. S., 487.

†See extensive foot-note appended to *Missouri, etc., Co. v. Criswell* (Tex.), 29 R. R. R. 673, 52 Am. & Eng. R. Cas., N. S., 673.

‡For the authorities in this series on the subject of the duties and liabilities of carriers with respect to persons accompanying or assisting their passengers, see third paragraph of second foot-note appended to *Birmingham Ry., etc., Co. v. Sawzer* (Ala.), 29 R. R. R. 779, 52 Am. & Eng. R. Cas., N. S., 779.

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Witnesses—Recalling Witnesses—Discretion of Court.—In an action for personal injuries, the court did not abuse its discretion in permitting plaintiff to be recalled, after defendant's case was closed, to testify as to how much his time was worth.

Continuance—Absence of Evidence—Discretion of Court.—It was within the trial court's discretion to deny a continuance in a personal injury action to permit defendant to rebut evidence by plaintiff as to the value of his time.

Damages—Personal Injuries—Instructions.—In an action for personal injuries, an instruction that in assessing plaintiff's damages the jury should consider his earning capacity, his physical condition both before and after the injury, and the nature and character of the injuries, and whether they were permanent or temporary, and allow such sum as will fairly and reasonably compensate him including reasonable compensation for past or future physical pain and suffering, was not erroneous.

Damages—Excessive Damages—Personal Injuries.—Plaintiff fell through a seat in a railroad depot, and his back was hurt so as to confine him in bed for five days, and he was unable to put on his shoes unaided for three weeks, during which time he suffered much pain, and was put to other expense for hiring necessary farm labor. Held, that a verdict for \$450 was not excessive.

Appeal from Circuit Court, Miller County; Jacob M. Carter, Judge.

Action by R. Grimsley against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The appellee sued appellant to recover damages for injuries received by him in falling through a seat in the passenger depot of appellant in the city of Texarkana, Ark. The seat had a defective bottom. Appellee alleged that he accompanied his daughter-in-law and her children to said depot for the purpose of aiding them to embark on said appellant's passenger train as passengers, that when they arrived at the depot he purchased a ticket for them and took a seat beside his daughter-in-law to wait for the train, and, on account of the defective chair, fell through it and was injured. Appellee alleged that appellant knew, or should have known, of the defective condition of the seat, and that by reason of the negligence of appellant in failing to provide and maintain said seat in a reasonably safe condition he had been damaged in the sum of \$1,500. He alleged how he was damaged. The appellant answered denying all the material allegations, but did not set up contributory negligence as a defense. The evidence on behalf of appellee tended to prove that on the 27th day of July, 1907, he went with his daughter-in-law and her two small children to appellant's depot, in the city of Texarkana, for the purpose of purchasing her ticket

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and aiding her and the children in getting on the train. He says: "After purchasing her ticket, I handed her the ticket, and then monkeyed with the children a little, and then turned around and sat down on the seat right beside her. I fell through the seat, and it had my feet right up in my face. The seat was thin bottom and perforated. It was fastened with tacks, but was not fastened at all where I sat down. The front side was not tacked. I examined it and could put my hand on it and mash it in, and when I took my hand off it would come back up again." The appellee then tells that he was hurt in his back, that he was in bed five days, and that for three weeks he could not put on his shoes unaided. He suffered much pain. Another witness testified that he saw the chair in which appellant was injured about one week before, that he started to sit down in the chair, and noticed that the tacks were out of it. The chair was in plain sight in the middle of the room. The appellee was a farmer, and had done most of his work on the farm to the time of his injury. He had a crop of corn and cotton planted. He had to hire help to have his crop gathered.

The court, at request of appellee, gave the following instructions:

"You are instructed that it was the duty of the defendant to keep the seats in the waiting room in reasonably safe condition for the use of passengers who came to the depot for the purpose of taking the train, or for those who came as escorts with them to assist them in taking the train. If you find that the plaintiff came to the depot with his daughter-in-law and her children for the purpose of aiding them in taking the train as passengers, and when in said depot he was injured in his person by reason of acts complained of in his complaint, then you will inquire whether said seat was in a reasonably safe condition when plaintiff sat down upon it. If you find that it was not in a reasonably safe condition when he sat down upon it, then you will inquire whether such condition was an act of negligence on the part of the defendant, and was such an act of negligence as that some injury might have been foreseen or reasonably anticipated as the probable result of such an act of negligence. If you find the foregoing facts in the affirmative, then your verdict should be for the plaintiff."

"(3) If you find for the plaintiff, then in assessing his damages you should take into consideration his earning capacity before and after the injury was received as may be shown by the proof, his physical condition before and after the injury, and the nature and character of the injury received—whether it be permanent or temporary in its nature—and find for him such sum as will fairly and reasonably compensate him therefor. And you are further instructed to include therein fair and reasonable compensation for any physical pain and suffering he may have

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undergone, or may undergo in the future, as a result thereof, if any."

The court gave, among others, the following at the request of appellant.

"The burden of the proof is on the plaintiff to show by a preponderance, or a greater weight, of evidence that plaintiff fell through the chair as alleged in the complaint, that the chair was defective, and that its defective condition was known to defendant, or that defendant by ordinary care should have known of its condition."

"(10) Although the jury may believe that the seat in question was defective, yet if such defect was plain and plainly to be seen, and plaintiff discovered this defect, or failed to use ordinary care in that direction, he cannot recover."

And refused the following:

"(7) The jury are instructed that it was the duty of the plaintiff, before attempting to sit down on the seat or chair upon which he attempted to sit, to have looked at the same, and if he failed to do so, and if the defect in the chair or seat was such as was plainly obvious and could have been seen or detected by simply looking at it, then he is guilty of contributory negligence and cannot recover in this case."

The verdict was in favor of appellee in the sum of \$450. Judgment was entered against appellant for that amount, and this appeal was taken.

E. B. Kinsworthy and Lewis R. Laton, for appellant.

Joe E. Cook, for appellee.

WOOD, J. (after stating the facts as above). Appellant contends that appellee's own evidence shows that he was guilty of contributory negligence, and that the court should have so told the jury as matter of law, and should have granted appellant's request for peremptory instruction because of appellee's contributory negligence. The court's ruling was correct. Appellant did not set up contributory negligence in its answer, and hence it was not an issue in the case. *Railway Co. v. Philpot*, 72 Ark. 23, 77 S. W. 901. But, even if it had been pleaded, it was at most only a question for the jury under the evidence, and the court told the jury, in the first instruction given at appellee's request, to which no objection is urged here, that "ordinary care was required of appellee." The court also in appellant's request 10 presented the question of appellee's contributory negligence to the jury. For the above reasons there was no error in the refusal of the court to grant appellant's prayer numbered 7.

The appellant complains that appellee's prayer No. 2 given by the court makes appellant an insurer of its premises against all injuries. The request in the first and second paragraphs was

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inaccurately worded in telling the jury that it was the duty of appellant to keep its waiting room in a "reasonably safe" condition, and that it was their duty to inquire whether the seat was in a "reasonably safe condition," for it was the duty of appellant only to exercise ordinary care to keep its waiting room in safe condition; but the third and fourth paragraphs show plainly that the court intended to and did tell the jury that the point of inquiry was as to whether the waiting room was in an unsafe condition on account of the negligence of appellant, and that unless such condition existed through the negligence of appellant, there would be no liability. While the instruction was not aptly worded and cannot be approved as a precedent, it did not, as a whole, announce an erroneous principle. The specific objection made to it was that it did not define "negligence," or incorporate the proposition of reasonable care; but the court in other instructions had told the jury that appellee could not recover unless he proved that appellant knew, or by the exercise of ordinary care should have known, of the defective condition of the seat. The instructions, taken as a whole, correctly submitted the question of whether or not appellant was negligent in the manner charged in the complaint.

There was no error in refusing appellant's prayers to the effect that, unless appellee was intending to become a passenger at the time of the injury, he could not recover. The duty of carriers of passengers to exercise ordinary care to keep their waiting rooms in reasonably safe condition is for the benefit, also, of those who go there for the purpose of meeting and assisting the incoming, or of aiding the outgoing, passengers in such friendly offices as may be reasonably necessary for their convenience, comfort, and safety. Such persons are upon the premises upon the implied invitation of the railroad company. *Railway Co. v. Lawton*, 55 Ark. 432, 18 S. W. 543; *Railway Co. v. Tomlinson*, 69 Ark. 489, 64 S. W. 347; *Montgomery & Eu-fala Ry. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72.

There was no error in permitting appellee to be recalled after the evidence was closed by appellant for the purpose of showing how much his time was worth, nor in refusing to continue the case at that juncture to permit appellant to rebut the evidence. The matter was in the discretion of the court, and no abuse of discretion is shown.

There was no prejudicial error in the giving of instruction No. 3 on the measure of damages.

We could not reverse the judgment as excessive under the evidence, even if there were no other element of damage than the physical injury and the consequent pain and suffering. The evidence sustained the verdict. The judgment is correct.

Affirm.

FISCHER v. COLUMBIA & P. S. R. Co.

(Supreme Court of Washington, April 7, 1909.)

[100 Pac. Rep. 1005.]

Carriers—Passengers—Care Required of Company.*—Carriers of passengers must use the highest degree of care.

Carriers—Trespassers—Persons Riding on Engine.†—Plaintiff, intending to take, as a passenger, a freight train, was told by the conductor that it would leave in about 10 minutes. He went some distance from the train, and, returning in about five minutes, found the train ready to start. Fearing that he would be unable to reach the caboose, he accepted the engineer's invitation to board the engine, and while riding thereon was injured. Held, that he was not a passenger, nor one to whom the company owed any affirmative duty; he being required to take notice that the engineer was unauthorized to permit him to ride on the engine, the conductor being the carrier's agent.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by John K. Fischer against the Columbia & Puget Sound Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Elias A. Wright and *F. C. Kapp*, for appellant.

Farrell, Kane & Stratton, for respondent.

GOSE, J. The plaintiff brought this action to recover damages for personal injuries. There was a judgment for the defendant, from which the plaintiff has appealed. The complaint states that on the 19th day of August, 1907, the respondent, a railway corporation, was a common carrier of freight and passengers for hire; that on such day it accepted the appellant as

*See first foot-note appended to *Roanoke Ry. & Elec. Co. v. Sterrett* (Va.), 30 R. R. R. 611, 53 Am. & Eng. R. Cas., N. S., 611; foot-note appended to *Tucker v. Rhode Island Co.* (R. I.), 30 R. R. R. 315, 53 Am. & Eng. R. Cas., N. S., 315; third foot-note appended to *McLean v. Atlantic Coast Line R. Co.* (S. Car.), 30 R. R. R. 76, 53 Am. & Eng. R. Cas., N. S., 76; third foot-note appended to *Birmingham Ry., etc., Co. v. Sawyer* (Ala.), 29 R. R. R. 779, 52 Am. & Eng. R. Cas., N. S., 779.

†For the authorities in this series on the subject of the authority of trainmen to accept persons as passengers on freight trains, see foot-note appended to *Missouri, etc., Ry. Co. v. Huff* (Tex.), 13 R. R. R. 344, 36 Am. & Eng. R. Cas., N. S., 344, where all those preceding it are collected; *Vassor v. Atlantic Coast Line R. Co.* (N. Car.), 25 R. R. R. 629, 48 Am. & Eng. R. Cas., N. S., 629 (conductor's authority); *O'Donnell v. Kansas City, etc., R. Co.* (Mo.), 21 R. R. R. 542, 44 Am. & Eng. R. Cas., N. S., 542 (authority of brakeman to make contract).

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a passenger, and agreed to carry him from Taylor Station to a station called "Camp No. 3"; that while carrying him the respondent carelessly and negligently permitted the train on which the appellant was riding to get beyond control and run away; that, as a result of such negligence, the train left the tracks, was wrecked, and the appellant was permanently injured. The answer admitted that the respondent was a railway corporation, and that it operated its line of road between the stations mentioned; but denied each of the other averments in the complaint. The respondent pleaded affirmatively that the appellant's injury was due to his own negligence; that he assumed the risk; that he was a trespasser upon the property of the respondent at the time he received his injury. The reply joined issue upon each of these affirmative averments. At the conclusion of the appellant's testimony, upon the motion of the respondent, the court entered a judgment dismissing the cause.

We gather from the evidence the following facts: At the time the appellant received the injury for which he seeks to recover judgment, the respondent was a railway corporation carrying freight and passengers for hire; that prior to June, 1907, it had operated one train daily between Taylor Station and Camp No. 3, upon which it had carried both freight and passengers; that at about this time it established a daily passenger train between these points, and also operated a daily freight train between the same points; that the freight train had no schedule time; that it would leave Taylor Station daily going north between 2 and 4 o'clock in the afternoon; that Camp No. 3 is about four miles northerly from Taylor Station; that there was no depot, waiting room, or platform at Taylor Station; that the appellant at the time of the injury was foreman of construction for Denny-Renton Clay & Coal Company; that on the day of the injury he was taking a car and a crew of men to Camp No. 3 for the purpose of having the car loaded and returned to Taylor Station; that there was a caboose on the freight train between such points on said day; that between 2 and 4 o'clock he directed his men to get aboard the train; that he inquired of the conductor how soon he would leave the station, and was informed that the train would start in about 10 minutes; that he went some distance from the train to attend to some business for his employer, returning in about 5 minutes; that the train was then ready to start; that he feared that, owing to the length of the train and the unevenness of the ground, he would not be able to reach the caboose in time to take passage; that the engineer told him to get on the engine, and he did so; that the crew, owing to defective brakes, lost control of the train; that when it was near Camp No. 3, where the switch had been left open by the respondent, the train was running at a high rate of speed; that the fireman jumped and told

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him to jump; that the engineer told him to jump, and he did so, and received the injury complained of. There is no evidence that the conductor knew that he was riding upon the engine, nor is there any evidence tending to show that any one in the caboose was injured. There is evidence that people were in the habit of riding on the freight train, which, as we have said, carried a caboose. The appellant testified that "I do not remember of seeing anybody ride on the engine."

The appellant urges two propositions: (1) That it is not negligence *per se* to ride on a freight train which is in the habit of carrying passengers; (2) that the fact that he was riding on the engine does not preclude a recovery. The decision of this and other courts as to whether it is negligence *per se* to board or alight from a moving train at the instance of the conductor we do not regard as applicable to the facts in the case at bar; nor do we regard as applicable the cases touching the status of a person riding on the platform of a car, or riding on a freight train which customarily carries passengers. In support of the second proposition, the appellant has cited three cases where the injury resulted to a party who was riding on an engine in which the question of negligence was submitted to the jury: Philadelphia, etc., R. Co. v. Derby, 14 How. 468, 14 L. Ed. 502; Waterbury v. New York, etc., R. Co. (C. C.) 17 Fed. 671; Lake Shore, etc., R. Co. v. Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510.

In Philadelphia v. Derby the plaintiff, a president of one railroad company, was riding upon an engine upon the invitation of the president of the defendant's road at the time of the injury. In Waterbury v. New York, etc., R. Co., the plaintiff, a stock drover, was riding upon the engine when he received the injury. It appeared that on various prior occasions he and other drovers had been permitted by employees of the defendant to accompany the cattle by the same train, sometimes on the cars of the cattle train, at other times on the engine. The drovers were required to look after their own cattle. At times the trains were delayed and the cattle required attention, and the railroad company did not look after them at such time. The grounds upon which the court submitted the case to the jury are well stated in the following language: "Upon the occasion in question, the plaintiff and another drover got upon the engine; there being none but box cars on the train. The engineer inquired if they had cattle on the train, and, being informed that such was the fact, made no objection to their riding upon the engine. * * * It should have been left to the jury to determine as a question of fact whether the defendant had by its conduct held out its employees to the plaintiff as authorized under the circumstances to consent to his being carried on the train with his cattle." But the court states the general rule as follows: "Undoubtedly the

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presumption of law is that persons riding upon a train of a railroad carrier, which are palpably not designed for the transportation of persons, are not lawfully there. And, if they are permitted to be there by the consent of the carrier's employees, the presumption is against the authority of the employees to bind the carriers by such consent." In *Lake Shore, etc., R. Co. v. Brown*, the deceased was, and for several years had been, a shipper of stock to the Union Stockyards, Chicago. The defendant's yards were about three-fourths of a mile from the stockyards, and its habit was to attach cars containing stock to a switch engine, and then convey them from the company's yards to the stockyards. On the day of the injury the caboose in which the deceased had been riding was detached from the train, and the switch engine attached thereto. The engineer told the deceased to get on the engine. He did so, and was killed. It was the duty of the company to carry the deceased and his stock to the stockyards, and no other mode of transportation was provided for the deceased. In *Pool v. Chicago, Milwaukee & St. Paul Ry. Co.*, 53 Wis. 658, 11 N. W. 15, an authority also relied upon by the appellant, the plaintiff, a detective, was injured while being carried on a hand car by the defendant, and at its request, to engage in its service. At page 659 of 53 Wis., at page 16 of 11 N. W., it is said: "That upon his going to the depot at Portage City the means of conveyance provided by the company or its agents was a hand car upon which he was directed to ride. This shows that this mode of transit was authorized by the company, and the company was certainly under obligation to use reasonable care to insure his safe carriage in that manner."

In the instant case the appellant had the option of two modes of riding: (1) Upon the passenger train which left Taylor Station daily going north, passing Camp No. 3, and leaving Taylor Station about noon; (2) the caboose on the freight train. The appellant, as we have stated, was foreman of a construction company. He was 41 years of age, receiving a salary of \$140 per month. We must, therefore, assume that he was a man of at least ordinary intelligence. The structure and use of an engine are such as to give notice to all persons of ordinary intelligence that it is not designed for the carrying of passengers. The conductor is the agent of the common carrier who has charge of the train and the passengers. The engine is designed and used for the accommodation of the engineer and the fireman in the discharge of their duties. Common carriers of passengers are held to the exercise of the highest degree of care. This is necessary for the protection of human life. This being true, public policy forbids that they should be hampered in the performance of this duty by carrying passengers on the engine or tender. The engine is a place of danger, and every person

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of ordinary intelligence will be required to take notice of this fact. The train upon which the appellant desired to be carried had a caboose. If he wanted to become a passenger, it was his duty to get aboard the train before it started, and take a place designed or used for the accommodation of passengers. He approached the conductor, and said to him that he wanted to go to Camp No. 3, and asked him when he would start. He testified that the train had no regular hour for leaving Taylor Station; that it left between 2 and 4 o'clock each afternoon. He knew when the conductor told him that it would start in about 10 minutes, that it was only an estimate of time. It was his duty to get on the train, and not to undertake to delay it by matters of no concern to respondent. If the train left him without fault upon his part, he had his action for damages.

In *Chicago & Alton R. Co. v. Mitchel*, 83 Ill. 427, speaking on this subject, it is said: "The permission of the engine driver, if given, was not the permission of the company, as he had no power to give it. Had the conductor of the train given the permission, or, knowing the deceased was upon the engine, suffered him there to remain, it might be considered the act of the company, as the conductor has control of the entire train and his act is rightfully regarded as the act of the company, and the authorities cited by the appellee on this point might be applicable. The driver of the engine occupies a different and very subordinate position. He has no right to say who shall be upon the train or take cognizance of such as may be upon it. He is to look to his engine, and keep it in order, and permit no one to ride upon it without the permission of his superior." In *Atchison, T. & S. F. R. Co. v. Johnson*, 3 Okl. 41, 41 Pac. 641, the plaintiff had paid a brakeman the sum of \$1 for the privilege of riding in a box car from the village of Purcell to the town of Guthrie, and while so riding he was injured. At pages 56-59 of 3 Okl., at pages 645 and 646 of 41 Pac., it is said: "There are certain facts in railroad passenger and freight traffic of which the public is required to take notice. One is that a passenger train is for the purpose of carrying passengers. Another is that a freight train is for the purpose of carrying freight. One proposing to be carried as a passenger upon a freight train must advise himself upon what terms the company will contract to carry him as a passenger, and with whom he may make the contract. The courts will require that the traveling public shall take notice that freight cars are not intended for the carriage of passengers; that, when passengers are accepted upon freight trains, the caboose attached to the train is the car in which passengers must place themselves, unless otherwise directed by a person having charge of the train; that the railroad company places a conductor in charge of each train, who has charge of its management in all respects, and with whom persons pro-

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posing to be carried as passengers must contract, and under whose direction they must act, subject to the rules of the company; that, in order to the manipulation of the mechanical movement of the train, it is necessary that the railroad company should employ an engineer, whose duty is to manage the engine, a fireman, whose duty it is to attend to the fires, and a brakeman, whose employment and duty is to attend to the brakes upon the train. A person proposing to become a passenger must deal with the conductor who has charge of the train, and not with the subordinate employees of the train. It is not within the scope or authority of the engineer, or brakeman to collect fare or bind the company, and the defendant in error had no right to suppose that the brakeman, Harry Hill, could bind the company by the agreement by which the defendant in error undertook to make the payment which he did. Upon his having undertaken to procure transportation upon the freight train of the plaintiff in error as a passenger, it was the duty of the defendant in error to have informed himself of the rules and regulations of freight trains, intended primarily for the carriage of freight, and to have informed himself by applying to the conductor who had charge of the train, and so ascertain upon what conditions he would be accepted and permitted to ride upon the train as a passenger. He failed to do this, and failed to become a passenger entitled to that high degree of care which railroad companies are held to owe to those who are accepted as, and whom it agrees to carry as, passengers. The defendant in error in undertaking to negotiate with the brakeman failed to put himself in charge of the carrier so as to raise the relation of carrier and passenger. * * * We shall accordingly hold that the defendant in error was by the act of going into the box car on the freight train of the defendant at the invitation of the brakeman, and without the knowledge of the conductor, guilty of such contributory negligence as would preclude his recovery in this case. * * *

In *Flower v. Pennsylvania R. Co.*, 69 Pa. 210, 8 Am. Rep. 251, the fireman asked a boy 10 years of age to put in the hose on the tender and turn on the water. The boy, in compliance with this request, climbed up the side of the tender, and, as he did so, some detached cars struck the car behind it. The boy was killed. The court, in holding the company exempt from liability, said: "This seems to be equally plain, without resorting to evidence given, that engineers are not permitted to receive any one on the engine, but the conductor and the foreman or superintendent; that it is the duty of the fireman to supply the engine with water; that he has no power to invite others to do it, and can leave his post only on a necessity. The business of an engineer requires skill and constant attention and watchfulness, and that of a fireman requires much skill and some

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attention. They are in charge of a machine of vast power and much capacity for mischief. * * * It may excite our sympathy, but cannot create rights or duties which have no other foundation." In *Snyder v. Han. & St. Jos. R. R. Co.*, 60 Mo. 413, servants of the company had been in the habit of permitting the injured boy and other boys to jump on the train and ride between certain points in the city. The boy was injured in attempting to get on the train. The court said: "The mere fact that a tortious act is committed by a servant while he is engaged in the performance of the service he has been employed to render cannot make the master liable. Something more is required. It must not only be done while so employed, but it must appertain to the particular duties of that employment." In *Duff v. Alleghany R. Co.*, 91 Pa. 458, 36 Am. Rep. 675, the conductor had permitted the injured boy to ride on the train from day to day, not as a passenger or an employee, but for the purpose of selling newspapers. The court said: "This is a case of a mere trespasser, and the company owed him no duty." In *Atchison, etc., R. Co. v. Lindley*, 42 Kan. 714, 22 Pac. 703, 6 L. R. A. 646, 16 Am. St. Rep. 515, a stock drover, at the request of the conductor, got on top of a freight car to give signals, and was injured. The court, in holding that the company had incurred no liability, said: "He occupied merely the position of a passenger who voluntarily assumed a very dangerous position. * * * The plaintiff did not become a passenger or obtain any of a passenger's rights by paying over his money at the demand of the brakeman, for it is not within the scope of authority, apparent or real, of the latter to collect fare. * * * From the undisputed evidence it is clear that the only duty owing to the plaintiff by defendant company was to refrain from wantonly inflicting an injury upon him." *McNamara v. Great Northern Ry. Co.*, 61 Minn. 296, 63 N. W. 726, 727. In the last case cited the injured party had paid a brakeman a sum of money for the privilege of riding in a box car. "But there are certain portions of every railroad train which are so obviously dangerous for a passenger to ride and so plainly not designed for his reception that his presence there will constitute negligence as a matter of law, and preclude him from claiming damages for injuries received while in such position. A passenger who voluntarily and unnecessarily rides upon the engine or the tender or upon the pilot or bumper of the locomotive or upon the top of the car or upon the platform cannot be said to be in the exercise of that caution and discretion which the law requires of all persons who are of full age, of sound mind, and of ordinary intelligence." *Little Rock & Ft. S. Ry. Co. v. Miles*, 13 Am. & Eng. R. R. Cas. (O. S.) pp. 23, 24. In *Railroad Co. v. Jones*, 95 U. S. 439, 442, 443, 24 L. Ed. 506, the court say: "The plaintiff had been warned against riding on the pilot, and forbidden

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to do so. It was next to the cowcatcher, and obviously a place of peril, especially in case of collision. There was room for him in the box car. He should have taken his place there. He could have gone into the box car in as little if not in less time than it took to climb to the pilot. The knowledge, assent, or direction of the company's agent as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed the suggestion to ride on the cowcatcher, or put himself on the track before the advancing wheels of the locomotive."

We conclude, therefore, that the engineer in inviting the appellant to get onto the engine did not act within the real or apparent scope of his authority; that the appellant was required to take notice of this fact; that the appellant was not a passenger; that the company owed him no affirmative duty; and that he cannot recover.

The judgment will therefore be affirmed.

MOUNT, CROW, DUNBAR, CHADWICK, and FULLERTON, JJ., concur. PARKER and MORRIS, JJ., did not sit.

HUNT v. BOSTON ELEVATED RY. CO. (two cases).

(Supreme Judicial Court of Massachusetts, Suffolk, Feb. 26, 1909.)

[87 N. E. Rep. 489.]

Carriers—Injury to Passenger—Action—Evidence.*—Evidence that while plaintiff was, by permission, standing on the platform of an elevated street car, she placed her hand on the door casing to save herself from being thrown as the car passed a curve, when her hand was injured by the door coming out of the socket and striking it, does not entitle her to recover against the car company for the injury; there being no evidence that the speed of the car was excessive or that the trainmen were negligent.

Exceptions from Superior Court, Suffolk County; Lloyd E. White, Judge.

Separate actions by Michael F. Hunt and Catherine Hunt against the Boston Elevated Railway Company. Defendant had judgment in each case, and plaintiffs bring exceptions. Exceptions overruled.

Kelly & Sheenan, for plaintiffs.

Choate, Hall & Stewart, for defendant.

RUGG, J. These are actions of tort, that of the female plaintiff

*See first foot-note of preceding case.

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being for injuries to her person, and that of the male plaintiff for the consequential damage suffered by him as her husband. In this opinion the plaintiff refers to Catherine Hunt. The plaintiff in company with another woman named McCarty took an elevated train at the Dudley street terminal for City Square, Charlestown, on July 5, 1905. After the train passed the Park street station in the Subway Mrs. McCarty became sick, and at Haymarket Square went with the guard's permission to stand on the front platform of the car, and stood leaning over the iron gate of the car. The plaintiff, fearing that Mrs. McCarty would fall over, left her seat, went to her assistance and supported her. The plaintiff was accustomed to riding upon the elevated trains nearly every day, and testified that the door leading upon the platform was open, as it frequently was on hot days, but there was no evidence as to when or by whom it was opened. After the train left the North station the plaintiff described the speed of the train while going around the curve as "terrible," "frightful," "greater than ever before," "awful," "very unusual," "very fast," and "it seemed the car would almost leave the track," and that while the train was thus going around the curve she placed her hand on the casing of the door to save herself from being thrown, and while in that position the door came out of the socket and struck against her hand. The door of the car was opened and closed by hand. It had an overhead brass run, and ran on a wheel, and there was some arrangement at the bottom of the door. When the door was to be opened it was thrown back, slid along in a casing, and was caught by a spring concealed in the woodwork of the car, and was held so that ordinarily it would not release itself, but all that was needed to release it from the catch was a little pull. It was supposed "to catch so that it could not lightly be thrown to—merely to hold it back like any door catch." There was also some evidence tending to show that the door swayed back and forth a little for a substantial time before the plaintiff was injured. It is strongly argued that owing to her familiarity with the route, the several opportunities which existed for Mrs. McCarty and the plaintiff to leave the car after the former became sick and before the accident, and that she voluntarily took her place in such an exposed position as the end of an elevated car, together with her observation that the door was oscillating before the injury, preclude the plaintiff from recovery. Without determining this question we pass to the discussion of the plaintiff's claim that the defendant was negligent by reason of the excessive speed at which the car was driven, and by reason of the closing of the car door against the fingers of the plaintiff. The elevated railway was established and its trains are operated for the purpose of rapid transit. The place provided for passengers during their passage is inside the car. There is nothing in the evidence to

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show that the speed at which this car was run was excessive. The evidence upon this point is a mere accumulation of declamatory adjectives. The record is bare of any testimony showing that in the place provided for passengers anything occurred out of the ordinary. It is a matter of common observation that there are lurches in the operation of trains upon the elevated structure, and there is every probability that these are necessary in the present state of the science even in connection with their operation under the high degree of responsibility which attaches to the defendant as a common carrier. In this respect the case is well within the cases of *McGann v. Boston Elevated Ry. Co.*, 199 Mass. 446, 85 N. E. 570; *Stevens v. Boston Elevated Ry. Co.*, 199 Mass. 471, 85 N. E. 571; *Foley v. B. & M. R. R.*, 193 Mass. 333, 79 N. E. 765, 7 L. R. A. (N. S.) 1076; *Weinschenck v. N. Y., N. H. & H. R. R.*, 190 Mass. 250, 76 N. E. 662. There is no evidence to show what caused the door of the car to be free from the catch. That may have been as attributable to the act of a fellow passenger in opening the door for ventilation, entrance or exit, as to the act of any person for whom the defendant was responsible. *Faulkner v. B. & M. R. R.*, 187 Mass. 254, 72 N. E. 976. Taking all the evidence together, in the light most adverse to the defendant, it does not appear that there was any circumstance within the knowledge of the defendant or its agents reasonably calculated to excite apprehension that an injury would be occasioned to any passenger, or that it failed in any duty owed to them.

Exceptions overruled.

MILES v. ST. LOUIS, I. M. & S. R. Co.

(Supreme Court of Arkansas, May 17, 1909.)

[119 S. W. Rep. 837.]

Appeal and Error—Review—Presumptions—Rulings—Grounds.—

Where testimony of plaintiff's wife was excluded on the ground that she was incompetent, the materiality of her testimony, if allowed, was not presented on plaintiff's appeal.

Appeal and Error—Harmless Error—Exclusion of Testimony—Prejudicial Effect.—

In an action for the death of plaintiff's child, claimed to have been caused by being jerked off a train upon which it was placed by its mother, who saw the accident and had a somewhat better opportunity of knowing the facts than the other witnesses, error in excluding her testimony as to the circumstances of the accident was prejudicial, though the testimony of plaintiff and other witnesses tended to prove the same facts to which she would have testified.

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Witnesses—Privileged Communications—Husband and Wife—Testimony for Each Other—Action in Representative Capacity.—In view of Const. 1874, Schedule, § 2, providing that no witness shall be excluded because he is interested in the issue, Kirby's Dig. § 3095, prohibiting a husband or wife to testify for or against each other, is not grounded upon any pecuniary interest, but upon the public policy of preserving domestic tranquility, and should not be extended to cases not strictly within its terms and purpose, so that in an action by a husband, as administrator, for the death of his child, his wife could testify as to the circumstances of the accident; the suit not being one in his own right, even if he should receive a part of the money recovered as distributee of his child's estate.

Negligence—Contributory Negligence—Children.*—A child 3½ years old could not be guilty of contributory negligence.

Negligence—Imputed Negligence—Negligence of Parent—Mother—Action by Administrator.†—In an action by a father, as administrator of his child's estate, for its death by being jerked off the platform of the caboose of a freight train on which it was placed by its mother, the negligence of the mother could not be imputed to the child to bar a recovery; plaintiff suing for the estate.

Carriers — Passengers — Injuries — Actions — Instructions — Applicability to Case—Imputed Negligence.†—In an action by the father, as administrator, for the death of a child by being jerked off the platform of a train after it was placed thereon by its mother preparatory to taking passage, it was error to instruct that attempting to board a moving train before it comes to an absolute stop is contributory negligence, and if the train stopped at the station, and decedent's mother put her on the platform, and the slack of the train caused her to fall under the wheels, the jury must find for defendant.

Carriers — Passengers — Actions — Instructions — Applicability to Case.—In an action by a father, as administrator, for the death of a child by being jerked off the platform of a train on which it was placed by its mother preparatory to boarding it as a passenger, it was error to instruct that if the child's mother put it on the plat-

*For the authorities in this series on the question whether young children can be guilty of contributory negligence, see first foot-note appended to Birmingham, etc., Co. v. Landrum (Ala.), 28 R. R. R. 593, 51 Am. & Eng. R. Cas., N. S., 593; first foot-note of Casey v. Boston Elev. Ry. Co. (Mass.), 29 R. R. R. 245, 52 Am. & Eng. R. Cas., N. S., 245; last foot-note of Birmingham, etc., Co. v. Jones (Ala.), 27 R. R. R. 781, 50 Am. & Eng. R. Cas., N. S., 781.

†For the authorities in this series on the subject of the imputable negligence of parents, see second foot-note of Richmond, etc., R. Co. v. Martin's Adm'r (Va.), 13 R. R. R. 435, 36 Am. & Eng. R. Cas., N. S., 435; last foot-note of Mattson v. Minnesota & N. W. R. Co. (Minn.), 16 R. R. R. 502, 39 Am. & Eng. R. Cas., N. S., 502; Serano v. New York, etc., Co. (N. Y.), 25 R. R. R. 293, 48 Am. & Eng. R. Cas., N. S., 293 (where child in crossing railroad exercises the care required of an adult); Atchison, etc., R. Co. v. Calhoun (Okla.), 29 R. R. R. 791, 45 Am. & Eng. R. Cas., N. S., 791 (negligence of mother not imputable to child).

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form before the passengers were notified to get aboard, and did not use ordinary care in doing so, and it was jerked off and killed, the company was not liable.

Carriers—Passengers—Injuries—Jury Question—Negligence.—In an action for the death of a child by being jerked off the platform of a train, where its mother had placed it preparatory to boarding it as a passenger, whether the jerking of the train was negligence held for the jury.

Carriers—Passengers—Injuries—Instructions—Misleading Instructions.—In an action for a child's death by being jerked off a freight train by the sudden starting of the train, an instruction that, if defendant's servants did what men of ordinary care would have done under the circumstances, they were not negligent, though the child was injured, and the company would not be liable, as it could only be liable if the evidence showed it was negligent, was misleading as tending to place the burden upon plaintiff to show negligence.

Carriers—Passengers—Injuries—Actions—Burden of Proof—Negligence.‡—A showing that plaintiff's intestate was injured by the operation of a train, which she was then attempting to board as a passenger, made out a prima facie case of negligence so as to place the burden upon the company of negating negligence.

Carriers—Passengers—Injuries—Actions—Burden of Proof—Contributory Negligence.§—Even if the mother's contributory negligence was a defense to an action for a child's death while a passenger by its administration, the burden of proving contributory negligence was on the railroad company.

‡For the authorities in this series on the question whether a presumption of negligence on the part of the carrier arises from the fact that a passenger is injured, see last foot-note of *Armstrong v. Portland Ry. Co. (Ore.)*, 31 R. R. R. 89, 54 Am. & Eng. R. Cas., N. S., 89; third foot-note of *Taber v. Seaboard Air Line Ry. (S. Car.)*, 31 R. R. R. 60, 54 Am. & Eng. R. Cas., N. S., 60; first foot-note of *McLean v. Atlantic Coast Line R. Co. (S. Car.)*, 30 R. R. R. 76, 53 Am. & Eng. R. Cas., N. S., 76; second foot-note of *Pere Marquette R. Co. v. Strange (Ind.)*, 30 R. R. R. 66, 53 Am. & Eng. R. Cas., N. S., 66; first head-note of *Paul v. Salt Lake City R. Co. (Utah)*, 30 R. R. R. 144, 53 Am. & Eng. R. Cas., N. S., 144; first head-note of *Ginn v. Pennsylvania R. Co. (Pa.)*, 30 R. R. R. 650, 53 Am. & Eng. R. Cas., N. S., 650; foot-note of *McGann v. Boston Elev. Ry. Co. (Mass.)*, 30 R. R. R. 618, 53 Am. & Eng. R. Cas., N. S., 618; first foot-note of *Briggs v. Durham Traction Co. (N. Car.)*, 30 R. R. R. 324, 53 Am. & Eng. R. Cas., N. S., 324; foot-note appended to *Russell v. Seattle, etc., Co. (Wash.)*, 29 R. R. R. 321, 52 Am. & Eng. R. Cas., N. S., 321; foot-note of *Central, etc., Ry. Co. v. Geopp (Ala.)*, 29 R. R. R. 315, 52 Am. & Eng. R. Cas., N. S., 315; first foot-note of *Birmingham, etc., Co. v. Sawyer (Ala.)*, 29 R. R. R. 779, 52 Am. & Eng. R. Cas., N. S., 779; first foot-note of *Kansas City S. Ry. Co. v. Davis (Ark.)*, 29 R. R. R. 664, 52 Am. & Eng. R. Cas., N. S., 664; first foot-note of *Cleveland, etc., Ry. v. Hadley (Ind.)*, 29 R. R. R. 638, 52 Am. & Eng. R. Cas., N. S., 638; fifth head-note of *Cleveland, etc., Ry. Co. v. Hadley (Ind.)*, 29 R. R. R. 10, 52 Am. & Eng. R. Cas., N. S., 10.

§For the authorities in this series on the subject of the burden of proving contributory negligence on the part of a passenger, see

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Appeal from Circuit Court, Hot Spring County; W. H. Evans, Judge.

Action by Tom M. Miles, administrator, against the St. Louis, Iron Mountain & Southern Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed, and remanded for new trial.

This was a suit by Tom M. Miles, as administrator of the estate of Mary Ellin Miles, to recover for damages alleged to be due the estate on account of the alleged negligent killing of Mary Ellin Miles by the appellee. It was alleged: "That the said Mary Ellin Miles was boarding said train as a passenger with her mother, and that she was lifted up on the platform of the caboose by her mother, and just after she was lifted up on the platform her mother turned around to pick up her grip, which she had set down so she could lift the said Mary Ellin Miles up on said platform, and before the said Mary Ellin Miles got in the caboose, and before her mother had time to get up on said platform, the defendant company negligently and carelessly shoved said train backwards, and caused the said Mary Ellin Miles to fall down on the track between said cars, and after she fell down on said track the defendant company negligently and carelessly pushed a car against and over her, causing her to receive injuries from which she suffered from 10 o'clock a. m. on the 24th day of August, 1907, until about 1 o'clock p. m. the next day, when she died of such injuries. That the injuries were caused by the failure of the defendant to keep a constant lookout while operating its train, and by the negligence and carelessness of the agents and servants of defendant in not handling the train properly, and in moving said train when it knew, or by the exercise of due care could have known, that Mary Ellin Miles was in a position of danger." Damages for the estate were laid in the sum of \$5,000, for which judgment was asked.

The answer of appellee denied all the material allegations, except the killing, and set up contributory negligence on the part of the mother of Mary Ellin Miles. The evidence on behalf of appellant tended to show the following facts: That Elvira Miles was the wife of Tom M. Miles, and that they resided at Perla, Ark., and that on the 24th day of August, 1908, about 10 o'clock a. m., Elvira Miles was at Smackover, Ark., a regular station on the St. Louis, Iron Mountain & Southern Railroad Company,

second foot-note of *Taillon v. Mears* (Mont.), 10 R. R. R. 516, 33 Am. & Eng. R. Cas., N. S., 516; *Southern Ry. Co. v. Burgess* (Ala.), 21 R. R. R. 321, 44 Am. & Eng. R. Cas., N. S., 321 (burden was on carrier to show that freight train passenger attempted to leave train in an improper manner and at an improper time and place); *Jones v. United Rys. & Elec. Co.* (Md.), 13 R. R. R. 631, 36 Am. & Eng. R. Cas., N. S., 631 (where street car passenger was struck by projecting load on passing wagon).

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with their child, Mary Ellin Miles, who was 3½ years of age, for the purpose of boarding the local freight train of the said St. Louis, Iron Mountain & Southern Railroad Company as a passenger to go to Perla, Ark., and, after said train came up to the station and stopped where passengers usually get on and off of said train, that the said Elvira Miles started to board said train with her child, and that she set her basket down and lifted the child up on the front platform of the caboose, and then stooped down and picked up her basket and started to get on herself, and that as she started to get on, and while she had hold of one of the handholds with one hand and one foot on the bottom step of the platform, and before the child got inside of the caboose, the train shoved back with a sudden jerk and threw the child down on the track between the cars, and caused it to be run over by the wheels of the car in front of the caboose, which crushed one leg and one thumb; that the child was taken from under the cars and carried to a doctor's office, where the leg was amputated and the thumb dressed, and, after this, was carried to a house near by, where it was kept until the next day about 1 o'clock p. m., at which time it died from the effects of the injuries received; that it was conscious all the time after it was injured, except when it was under the influence of anæsthetics while it was being operated on; that the train was still when she started to get on, and, as she was in the act of getting on, one of the brakemen gave a signal to back up; and that the train did back in the manner stated and caused the injuries alleged. There was evidence tending to prove that all the passengers had not debarked, and one of them had started to get off, but had not reached the door, when the little girl fell. The appellant offered to prove by Elvira Miles, the wife of Tom Miles, the plaintiff, that Mary Ellin Miles was injured and killed as alleged in the complaint, but the court refused to allow Elvira Miles to testify on the ground that she was not a competent witness. The appellee adduced evidence tending to prove that it was not negligent in operating its train on the occasion when Mary Ellin Miles was injured.

The appellant asked several instructions. The court refused to grant all the prayers as asked, but modified some of them and gave them in the modified form, over appellant's objection. Other prayers for instructions by appellant were granted. The court, over the objection of appellant, refused the following prayer for instruction: "(3) The court instructs the jury that a child of tender years cannot be guilty of negligence, nor can the negligence of the parent be imputed to the child, and that if you believe from the evidence that the agents and servants of the defendant company could have seen, by the exercise of reasonable care and diligence, that the said Mary Ellin Miles was in a position of danger at the time they backed said train, and

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that said agents and servants of the defendant failed to exercise reasonable care and diligence to see her position, it will be your duty to find for the plaintiff." The court, over the objection of appellant, gave the following prayers for instructions presented by appellee: "(2) You are instructed that attempting to board a moving train or a freight train before it comes to an absolute stop is contributory negligence and bars a recovery, and if you find from the evidence in this case that the local freight train ran up to Smackover and made the usual stop, and that the deceased's mother put her on the platform, and that the slack of the train caused her to fall under the wheels and get injured and killed, your verdict must be for the defendant. (3) You are instructed that freight trains, both in starting and stopping, necessarily jerk more than passenger trains, and you are further instructed that this jerking is not negligence, and, if it caused the injury, there is no liability, and you cannot find against the company. (4) If you find from the evidence in this case that, when the local train ran up to Smackover, and the child's mother, before there was any instructions for passengers to get aboard, set the little three year old child on the platform, and in doing so she failed to use ordinary care and caution, and the jerk of the train threw her down and injured and killed her, the defendant is not liable, and your verdict must be for the defendant. * * * (6) If you find from the evidence in this case that the defendant's agents and servants did what men of ordinary care and prudence would have done situated as they were, they were not guilty of negligence, although the child may have been injured as alleged in plaintiff's complaint, and defendant company would not be liable if the proof shows it was guilty of negligence."

The verdict was in favor of appellee. A motion for new trial, assigning as errors the various rulings to which exceptions were had, was overruled. Judgment was entered for appellee, which this appeal seeks to reverse.

Jabez M. Smith, for appellant.

E. B. Kinsworthy, Lewis Rhaton, and Bridges, Wooldridge & Gantt, for appellee.

WOOD, J. (after stating the facts as above). First. The court refused to allow the wife of the appellant to testify on the express ground that she was not a competent witness. The question therefore as to whether her testimony, if allowed, would have been material and prejudicial, is not presented. "Where a witness is rejected on the ground of incompetency, it must be presumed that the witness would have been rejected no matter how material the evidence might have been." *Rickerstricker v. State*, 31 Ark. 208. Moreover, if, as the record shows, her testimony would have tended to prove that Mary Ellin Miles was injured

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and killed in the manner alleged in the complaint, then the exclusion of it was highly prejudicial. For no one can divine what weight the jury might have given it. Her situation at the time enabled her to have, perhaps, a more accurate and comprehensive knowledge of the facts than any other witness. No matter if the testimony of other witnesses tended to prove the same facts, her testimony no doubt would have greatly fortified that of her husband, or any other witness, and the jury may have regarded it as more important than any other. It must be presumed that prejudice resulted in the exclusion of a witness who possessed such excellent opportunities for knowing the facts.

At the common law, on the grounds both of identity of interest and public policy, the husband and wife were incompetent to testify for or against each other. 2 Kent's Com. § 179; 1 Cr. Ev. § 334. But since the adoption of the Constitution, which provides that "no witness shall be excluded because he is a party to the suit or interested in the issue to be tried" (Const. 1874, Schedule, § 2), the statute which now renders the husband and wife incompetent to testify "for or against each other, or concerning any communication made by the one to the other during marriage," is not grounded upon any identity of pecuniary interest that the one may have in the result of a suit by the other. But the reason for the rule that now excludes them from testifying for or against each other is the "anxious solicitude, which the law discovers to preserve domestic tranquility." In other words, it is the wise public policy of conserving and promoting domestic peace and happiness, which has been embodied in the statute. Section 3095, Kirby's Dig.; *Collins v. Mack*, 31 Ark. 684. This court has often held that the husband and wife were incompetent to testify for or against each other in suits where the one or the other was a party, in his or her own right, and not in some fiduciary or representative capacity. *Phipps v. Martin*, 33 Ark. 207; *L., R. & Ft. S. R. Co. v. Payne*, 33 Ark. 815, 34 Am. Rep. 55; *Casey v. State*, 37 Ark. 67; *Miss. River H. & W. R. Co. v. Ford*, 71 Ark. 192, 71 S. W. 947; *St. L. I. M. & Sou. R. Co. v. Courtney*, 77 Ark. 431, 92 S. W. 251; *Mahoney v. Roberts*, 86 Ark. 130, 110 S. W. 225; *Taylor v. McClintock*, 87 Ark. —, 112 S. W. 405. To have held otherwise in those cases would have been contrary to the statute *supra*. And so long as identity of pecuniary interest was recognized as one of the basic principles for the rule of exclusion, it would necessarily operate in collateral suits, where the husband or wife were not parties to the record, but directly interested in the outcome of the litigation. 1 Gr. Ev. 341. See, also, *Leach v. Fowler*, 22 Ark. 143. But since interest is no longer to be considered as the reason for the statutory rule, it should not be extended to compass cases that do not come strictly within its terms. As was said by the Supreme Court of Kansas concerning a statute similar to

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the provision of our constitution *supra*: "As our statute has opened wide the door to all persons to be witnesses without regard to their interest in the suit, except as affecting their credibility, we ought not to keep up the disqualification as to the wife being a witness on account of the interest of the husband, unless the plain provision of the law forbids any other conclusion." *Van Vleet v. Stout*, 44 Kan. 526, 24 Pac. 960; *F. A. Higbee v. McMillan*, 18 Kan. 133. Since the old rule disqualifying because of pecuniary interest has passed away, the trend of decisions is to turn on all the light possible in the admission of evidence, leaving the question of credibility for the jury. *Schouler's Dom. Rel.* pp. 53, 54, § 53; *Rogers, Dom. Rel.* p. 212, § 290, and cases cited. See *Railway v. Amos*, 54 Ark. 159, 15 S. W. 362; *Klenk v. Knoble and Wife*, 37 Ark. 298; *Board v. Moore's Adm'r (Ky.)*, 66 S. W. 417; *Mitchell Adm'r v. Brady*, 124 Ky. 411, 99 S. W. 266, 13 L. R. A. (N. S.) 751, 124 Am. St. Rep. 408. In *Nolen v. Harden et al.*, 43 Ark. 307, 51 Am. Rep. 563, it is held (quoting syllabus): "The public policy which forbids a husband or wife from testifying for or against each other does not extend to collateral suits between third parties. In these a wife may testify as to transactions of her husband, where she can do so without breach of matrimonial confidence." And in *Railway Co. v. Rexroad*, 59 Ark. 180, 26 S. W. 1037, we said (quoting syllabus): "In an action by a husband as next friend for the sole benefit of an infant child, his wife is a competent witness, as he is merely the manager or conductor of the suit, and the fact that he is liable for costs does not disqualify her, under Mansf. Dig. § 2859, providing that husband and wife shall be incompetent to testify for or against each other."

So here the husband is acting in his fiducial capacity. He is suing for the sole benefit of the estate. If he should recover, and should receive a part of the fund recovered as a distributee of his daughter's estate, still that would not make the present suit one in his own name and right. We are of the opinion that, when the husband sues, not in his individual, but representative, capacity, the suit is not by and for him, and therefore the wife in such case is not a witness for him in the meaning of the statute.

Second. This being a suit by the administrator for the benefit of the estate, the court should have given appellant's prayer No. 3. *St. L., I. M. & S. R. Co. v. Dawson*, 68 Ark. 7, 56 S. W. 46; *Air Line Ry. Co. v. Gravitt*, 93 Ga. 369, 383, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145; *Norfolk, etc., R. Co. v. Grose-close*, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718; *Wymore v. Manhaska County*, 78 Iowa, 396, 43 N. W. 264, 6 L. R. A. 545, 16 Am. St. Rep. 449; *Beach, Contributory Neg.* § 131a. As to whether appellant was entitled to a distributive share, should

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there be a recovery, was not presented in this case. The only issue under the pleadings was whether or not appellant should recover, not for his own benefit, but for the benefit of the estate. There is no count in the complaint seeking to recover for his own benefit as next of kin, as there was in the Dawson case, *supra*.

The court also erred in giving appellee's prayers numbered 2 and 4. Instruction No. 3 at the instance of appellee virtually told the jury that the jerking of the train was not negligence, and that if such jerking caused the injury appellee was not liable. This was error. The question should have been submitted to the jury to determine whether the jerking of the train under the circumstances was negligence. Instruction No. 6 at the request of appellee placed the burden upon appellant to prove that appellee was guilty of negligence. At least the instruction was fairly susceptible of that meaning, and was therefore misleading and prejudicial. Appellant having shown that his intestate was injured by the operation of the train while she was attempting to board same as a passenger, a *prima facie* case of negligence against the company was thereby established, and it then devolved upon appellee to prove that it was not negligent. *St. L., I. M. & S. R. Co. v. Standifer*, 81 Ark. 275, 99 S. W. 81; *Barringer v. St. L., I. M. & S. R. Co.*, 73 Ark. 552, 85 S. W. 94, 87 S. W. 814; *St. Louis, I. M. & S. R. Co. v. Neeley*, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616.

The court erred in modifying appellant's prayer for instructions numbered 1 and 2. The modification allowed the defense of contributory negligence on the part of the mother of the child, and placed the burden on appellant to prove that the mother was free from contributory negligence. Even if contributory negligence were a defense in such cases, the burden would be upon the one pleading it to prove it. *L., R. & Ft. S. R. Co. v. Eubanks*, 48 Ark. 475, 3 S. W. 808, 3 Am. St. Rep. 245.

We find no other reversible errors in the record.

For those indicated the judgment is reversed, and the cause is remanded for new trial.

CINCINNATI TRACTION CO. *v.* LEACH.

(Circuit Court of Appeals, Sixth Circuit, April 19, 1909.)

[169 Fed. Rep. 549.]

Appeal and Error—Exceptions—Necessity of Specific Exceptions to Instructions.—A general exception to the charge of a court on the ground that it did not instruct more fully upon a subject is unavailing, unless counsel specifically states such further instruction as is desired, and requests that the same be given.

Carriers—Injury to Passenger—Contributory Negligence.*—Where it was the custom of a street railroad company to permit passengers to stand on the rear platform of its cars which were closed with gates apparently securely closed and fastened, it was not the duty of a passenger so riding to critically examine the fastenings, but only to exercise reasonable care to protect himself from injury, and where he was thrown off and injured by reason of the giving way of the gates he is not chargeable with contributory negligence because he did not take the additional precaution to see and use a handhold.

Carriers—Action for Injury to Passenger—Issues and Proof.†—Where, in an action by a passenger against a street railroad company to recover for a personal injury, plaintiff shows that while a passenger he was injured, the burden shifts to the defendant to satisfy the jury by a preponderance of the evidence that it was guilty of no negligence that proximately contributed to the injury.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Jos. Wilby, for plaintiff in error.

Edward Colston and *S. M. Johnson*, for defendant in error.

Before LURTON and SEVERENS, Circuit Judges, and McCALL, District Judge.

McCALL, District Judge. The plaintiff in error, the Cincinnati Traction Company is a corporation engaged in operating a street railway in Cincinnati, Ohio. On March 10, 1906, the appellee, Harry Leach, was a passenger aboard one of appellant's cars. He was standing on the rear platform of the car, and while it was in motion he fell or was thrown from the platform of the car into the street and was injured. Suit was instituted

*For the authorities in this series on the subject of the right of a passenger to rely on the assumption that the carrier has, or will perform its duties to him, see second foot-note appended to *Chicago, etc., Ry. Co. v. Simpson* (Ark.), 30 R. R. R. 798, 53 Am. & Eng. R. Cas., N. S., 798; last foot-note of *Harper v. Pittsburg, etc., Ry. Co.* (Pa.), 29 R. R. R. 650, 52 Am. & Eng. R. Cas., N. S., 650; second foot-note of *Olson v. Northern Pac. Ry. Co.* (Wash.), 29 R. R. R. 705, 52 Am. & Eng. R. Cas., N. S., 705.

†See third foot-note appended to preceding case.

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by the defendant in error to recover damages for the injuries sustained. The case was tried before the court and jury, resulting in a verdict for the defendant in error in the sum of \$5,000. A motion for a new trial was made and disallowed. Thereupon errors were assigned, and an appeal taken to this court.

There are 25 assigned errors. After a careful examination of the record, we are unable to find any reversible error. It is strongly insisted that the question of contributory negligence on the part of the appellee was not submitted to the jury by the trial judge, and that the testimony introduced on the trial made such a case as required the submission of this question to the jury. Assuming, but not deciding, that the charge as to contributory negligence was not as full as it might have been, there was no specific request for any different or additional charge on this question. While the court was instructing the jury, the following colloquy took place between the court and counsel for appellant:

"Mr. Wilby: And as to the other point, about contributory negligence, I did not hear your honor charge as to that?"

"The Court: * * * Have you written out a charge covering your request, Mr. Wilby?"

"Mr. Wilby: No, your honor. I just wanted your honor to deal with the subject of contributory negligence. * * *

"The Court: Well, it would depend upon the necessity for doing anything to secure his safety. If the gate was of such structure and strong and high enough to justify him in relying upon it, then I do not think it would be negligence upon his part if he failed to see and use a handle bar, or do something else additional, to promote his safety."

If the appellant had wished different or additional instructions to the jury, such instructions should have been specifically stated, coupled with the request that the same be given in charge to the jury. This was not done, but appellant contented itself by reserving an exception to the charge, because the court did not charge more fully upon the subject of contributory negligence. The court below cannot be put in error on an exception so indefinite and general. *Anthony v. L. & N. R. R. Co.*, 132 U. S. 172, 10 Sup. Ct. 53, 33 L. Ed. 301; *Railway Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; *Columbus Const. Co. v. Crane Co.*, 98 Fed. 946, 40 C. C. A. 34; *Yates et al. v. U. S.*, 90 Fed. 57, 32 C. C. A. 507; *Shelp et al. v. U. S.*, 81 Fed. 694, 26 C. C. A. 570; *Price v. Pankhurst et al.*, 53 Fed. 312, 3 C. C. A. 551; *Coney Island Co. v. Dennon*, 149 Fed. 687, 79 C. C. A. 375.

Moreover, an attentive examination of the testimony set out in the record leads us to the conclusion that the trial judge would have been warranted in omitting any reference in his charge

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to the subject of contributory negligence. It is admitted that appellant's custom was to permit its passengers to occupy the rear platform of its cars, and therefore appellee was not guilty of negligence, in so far as this case is concerned, by riding on the rear platform. He was smoking when he went aboard the car, and was in the place required by the company of those passengers so indulging. He was standing with his feet firmly placed on the platform, with his back against the rear end of the car. Just to his right was an iron scissors gate, about as high as his hips, and, to all appearances, securely closed and fastened. It was not his duty to make a close examination of the gate to determine its structure or strength, to save himself from the charge of negligence, but only to exercise reasonable care to save himself from injury. On the other hand, it was the duty of the appellant, as a common carrier of passengers, to exercise the highest degree of care and caution in and about the construction and strength and fastenings of the gate and other appliances of the car necessary to transport its passengers safely.

In the case at bar there is no testimony tending to show that the passenger was not in the exercise of due care. The burden rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. *Gleeson v. Virginia Midland Railroad Co.*, 140 U. S. 443, 11 Sup. Ct. 859, 35 L. Ed. 458, and cases there cited. The defendant in error having shown to the jury that he was a passenger aboard appellant's car, and that while such passenger he was injured, the burden of proof shifted to the appellant (defendant below) to satisfy the jury by a preponderance of the evidence in the case that it was guilty of no negligence that proximately contributed to the accident. This question, under proper instructions, was submitted to the jury, and the issue found against appellant. *Stokes v. Saltonstall*, 12 Pet. 181, 10 L. Ed. 115; *Railroad Co. v. Pollard*, 22 Wall. 341, 22 L. Ed. 877; *Gleeson v. Virginia Midland Railroad Co.*, *supra*; *Secord v. St. Paul, M. & M. Ry. Co.*, 18 Fed. 221; *Sprague et ux. v. Southern Ry. Co.*, 92 Fed. 59, 34 C. C. A. 207. As has been stated, the court said to the jury that:

"If the gate was of such structure and strong and high enough to justify him (the passenger) in relying upon it, then I do not think it would be negligence upon his part if he failed to see and use a handle bar, or do something else additional to promote his safety."

The jury evidently found that the gate appeared to be of the character described in the charge, when in point of fact it was not; and that the appellee was not guilty of contributory negligence in failing to see and use a handle bar, or do something in addition to what he did, to promote his safety.

The case is affirmed.

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NOTE.—The following is the opinion of Thompson, District Judge, in the court below.

THOMPSON, District Judge. Leach stood on the rear platform, between the entrance door to the car and the gate, with his back towards or against the body of the car. The gate was 30 inches high. The platform was 4 feet 6 inches long from the door to the center of the dash board in the rear, and 5 feet wide from side to side, but narrowed a little between the steps leading to it from each side. At the time of the accident from six to eight passengers were standing on the platform. Through some ordinary movement of the car Leach lost his balance and was thrown against the gate, which gave way, precipitating him into the street and causing severe bodily injuries, and in his petition he claims that the giving way of the gate and the consequent injuries which he suffered were due to the negligence of the traction company in permitting the gate "to become dangerous, insecure, and an insufficient protection to passengers," specifying in detail the elements of insecurity and danger. The traction company, answering, denies specifically the allegations of the petition charging it with negligence. It denies that the gate "was intended to be or was placed upon said car as a protection to passengers, other than to prevent passengers from entering upon or leaving the rear platform of said car from the blind or left side thereof," and denies that "said gate became or was dangerous, insecure, or an insufficient protection to passengers." And it alleges that, "if the plaintiff was injured to any extent at the time and place that said second amended petition alleges, his injury, if any, was caused by his own act in carelessly and negligently standing upon the rear platform of said car, without taking any precaution of maintaining himself upon said rear platform, and in carelessly and negligently failing to use ordinary care in standing upon said rear platform while said car was in motion, and in carelessly or negligently falling or permitting himself to fall with force and violence over, upon, and against the gate upon said rear platform, and in carelessly and negligently failing to observe the nature and construction of said gate as aforesaid."

It will be observed that the answer does not allege that the gate was insufficient to afford protection to passengers, but, on the contrary, denies that it "was an insufficient protection to passengers." It is not alleged in the answer, nor shown by the evidence, in what respect Leach was negligent in standing upon the platform and in falling against the gate; but it is shown by his testimony that he relied upon the gate for protection, that he came to Cincinnati on business four or five times a year for more than fourteen years, staying from five days to two weeks each time, and using street cars every business day, and observed that the gate was used as a safeguard to platform passengers, and had often

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seen people leaning against the same style of gate without objection by any employee of the company, and invariably, when he got on some of these cars with the scissors gates, he had seen men standing and leaning against the gate. The answer does not set up the defense of contributory negligence, but alleges that the plaintiff's "injury if any, was caused by his own act in carelessly and negligently standing upon the rear platform of said car," etc., and "that his injury, if any, was due to his own want of care, not to any negligence of any kind whatever on the part of the defendant." *Beach Contributory Negligence* (2d Ed.) § 64; *Birsch v. Citizens' Electric Company*, 36 Mont. 574, 93 Pac. 940; *Clark v. Canadian Pac. Ry. Co.* (C. C.), 69 Fed. 544. Nor does the defendant in its answer specify any act of negligence on the part of Leach which caused his injury, but relies on his admission on the witness stand that he had not hold of anything that might have prevented him from being thrown against the gate. In the crowded condition of the platform it is doubtful whether there was anything that he could have taken hold of, and, moreover, as he testified, he depended upon the gate for protection, without knowledge of its defective condition. The defective gate, and not the loss of balance, was the proximate cause of his injury; for, as is said in *Stappers v. Interurban*, 56 Misc. Rep. 337, 106 N. Y. Supp. 854: "This case is not based upon negligent operation, but upon negligent maintenance of an appliance, to which a different rule must be applied."

Counsel for the defendant, in offering his exceptions to the charge of the court, stated that the court instructed the jury that the gate was intended as a protection to passengers, thereby assuming the province of the jury. In this counsel was mistaken. What the court did say was this: "The gate was put there for the purpose of preventing passengers from entering from that side of the car, or alighting from that side of the car; but the claim is that the passengers on the platform, passengers who were permitted to stand upon the platform, did not know the use and purpose and design of the gate, but that they looked upon it as a means of protection against being thrown to the street, and that it was of such a condition and character as that they had a right to rely upon it as a means of protection, and that they did rely upon it, but that it failed, because of the inefficiency of these means which should have properly held it in place. Now, if passengers were justified in relying upon this gate as a means of protection, and if it was not in proper condition, but was in the condition described in the petition, and because of it being in this condition, brought about by the alleged negligence of the defendant, the plaintiff was thrown into the street by the lurching of the car, and thereby denied the protection which this gate should have afforded him if it had been in proper condition and

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repair, if it was of such a character as that the passengers had a right to rely upon it, then the defendant is to blame. If the gate was of such a construction, strength, and kind as to warrant the platform passengers in relying upon it as a means of protection, and if the plaintiff did rely upon it, and it failed to furnish him the protection which he had a right to rely upon, because of its being in a condition of nonrepair, such as I have already pointed out, and if his injuries were due to the negligence of the defendant in failing to keep it in a proper state of repair, then the plaintiff would be entitled to recover from the defendant such damages as would make him whole for the loss sustained by the reason of the injuries which he has suffered." The issues presented to the jury were whether the gate was of such construction, strength and kind as to warrant the platform passengers in relying upon it as a means of protection and whether the traction company negligently permitted it to become dangerous, insecure, and an insufficient protection to passengers, and upon these issues the jury found for the plaintiff.

The motion for a new trial, therefore, will be overruled.

SEVIER v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, April 9, 1909.)

[64 S. E. Rep. 390.]

Pleading—Amendments—Changing Cause of Action.—Where the complaint alleged that defendant negligently failed to stop a train at a station long enough for plaintiff, a passenger, to alight safely, and "negligently, * * * while plaintiff was endeavoring to get off the car, moved the same rapidly forward, causing plaintiff to fall," etc., and plaintiff's testimony was that the train did not stop a sufficient time to permit her to alight, and that while she was attempting to do so while the train was slowly moving she fell and was injured, an amendment substituting for the quoted words the words, "Defendant negligently started the car from the station before plaintiff had time to alight therefrom, and after defendant started the same and while it was moving slowly, plaintiff attempted to alight, and fell to the ground, defendant thus causing plaintiff to fall," etc., did not substantially change plaintiff's claim, and was proper under Code Civ. Proc. 1902, § 194.

Carriers—Injuries to Passenger Alighting from Moving Train—Contributory Negligence—Question for Jury.*—It is not contribu-

*See foot-note appended to *Marbourg v. Seattle, etc., Ry. Co.* (Wash.), 29 R. R. R. 607, 52 Am. & Eng. R. Cas., N. S., 607; foot-note appended to *United Rys. & Elec. Co. v. Bosik (Md.)*, 29 R. R. R. 256, 52 Am. & Eng. R. Cas., N. S., 256; foot-note appended to *Purvis v. Buffalo, etc., R. Co. (Pa.)*, 27 R. R. R. 748, 50 Am. & Eng. R. Cas., N. S., 748.

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tory negligence in law for a passenger to alight from a slowly moving train.

Carriers—Injuries to Passenger Alighting from Moving Train—Contributory Negligence—Questions for Jury.—Whether plaintiff, a passenger, was guilty of contributory negligence in alighting from a moving train held, under the evidence, for the jury.

Appeal from Common Pleas Circuit Court of Greenville County; Geo. E. Prince, Judge.

Action by Elizabeth M. Sevier against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Cothran, Dean & Cothran, for appellant.
B. M. Shuman, for respondent.

JONES, J. Plaintiff recovered judgment against defendant for \$500 for personal injuries alleged to have been sustained by her while a passenger on defendant's train from Spartanburg to Campobella on August 1, 1906. The plaintiff went to trial upon a complaint, in part alleging that defendant's servants, upon arrival of the train at said station, negligently, willfully, and recklessly failed to stop the train long enough for plaintiff to alight in safety, and "negligently, willfully, and recklessly, while plaintiff was endeavoring to get off of said car at said station, moved and caused the same to move rapidly forward and onward, thus causing plaintiff to fall and be thrown violently from said car to the ground." At the close of all the testimony, defendant moved to direct a verdict (1) because there was no evidence of willfulness to support punitive damages (as the court directed the jury not to find punitive damages this ground goes out of the case); (2) because there was no evidence to sustain the cause of action alleged in the complaint; (3) because the testimony shows conclusively that plaintiff was guilty of contributory negligence in alighting from the moving train. Plaintiff moved to amend the complaint to conform to the facts proved, and the court granted an amendment striking out the words which we have quoted above, and inserting in lieu the words: "Defendant negligently started said car from said station before plaintiff had time to alight therefrom, and after defendant started the same, and while it was moving slowly, plaintiff attempted to alight therefrom, and fell violently to the ground from said car, defendant thus causing plaintiff to fall and be thrown violently from said car to the ground." The testimony for plaintiff tended to show that the train did not stop a sufficient time to permit plaintiff to alight, and that, when attempting to do so while the train was slowly moving forward, she fell to the ground, and was injured. We do not think that the amendment allowed substantially changed the claim of plaintiff, and therefore it was

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expressly permitted by section 194, Code Civ. Proc. 1902; *Booth v. Langley Co.*, 51 S. C. 412, 29 S. E. 204; *Roundtree v. Railway*, 72 S. C. 476, 52 S. E. 231. Section 190 of the Code provides no variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice, and it appears that counsel for defendant upon the motion to direct a verdict stated that he had not been misled by the variance. The first and third exceptions therefore cannot be sustained.

Defendant's second, and remaining, exception, contends that the evidence warrants no other inference than that plaintiff negligently contributed to her injury by alighting from a moving train under circumstances making it obviously dangerous to do so. According to the testimony for plaintiff, the train was moving slowly, not over two miles per hour, and a witness for the defendant testified that the train had not moved more than the length of a car when plaintiff alighted. The authorities in this state hold it is not contributory negligence in law for a passenger to alight from a slowly moving train. *Cooper v. Railway Co.*, 56 S. C. 94, 34 S. E. 16; *Creech v. Railway*, 66 S. C. 533, 45 S. E. 86. The rule is thus stated in *Gyles v. Railway*, 79 S. C. 177, 60 S. E. 433: "The rule of law declared in this state is that it is not negligence *per se* to board or alight from a moving train, unless the train is moving so fast as to make the danger of alighting or boarding obvious to a person of ordinary prudence, and that ordinarily it should be left to the jury to determine whether the passenger's act is negligent under the circumstances. If, however, it be admitted or conclusively shown that the speed of the train is high and dangerous, it is contributory negligence in law to alight therefrom; the danger being obvious to a person of ordinary prudence. *Smith v. Southern Railway*, 80 S. C. 1, 61 S. E. 205. Under these authorities, the matter of contributory negligence was properly submitted to the jury.

The judgment of the circuit court is affirmed.

ST. LOUIS, I. M. & S. RY. CO. *v.* GILBREATH.

(Supreme Court of Arkansas, Oct. 26, 1908.)

[113 S. W. Rep. 200.]

Carriers—Carriage of Passengers—Obligation of Trainmen.—Trainmen, operating a freight train carrying passengers, must, after the caboose has been drawn up to a station to receive passengers, anticipate the presence of passengers in the caboose and exercise care not to injure them.

Carriers—Passengers—Contributory Negligence—Question for Jury.*—Whether a passenger on a freight train, injured by a car striking the caboose while uncoupled from the train, was guilty of contributory negligence because he was standing up in the caboose at the time of the accident, notwithstanding a notice posted therein warning passengers of the danger of standing up, held for the jury.

Negligence—Contributory Negligence—Evidence.—Contributory negligence must be proved, either by direct evidence or by evidence of circumstances from which it may be inferred.

Carriers—Injuries—Passengers—Contributory Negligence—Evidence—Sufficiency—Burden of Proof.†—A bare admission of a passenger on a freight train that he was standing up in the caboose when injured does not create a prima facie case of contributory negligence, so as to cast on him the burden of proving his freedom therefrom.

Carriers—Passengers—Contributory Negligence—Burden of Proof.†—Where negligence of a carrier, resulting in injury to a passenger, is

*For the authorities in this series on the question whether it is contributory negligence on the part of a passenger to stand up in a car, see last foot-note appended to *St. Louis, etc., Ry. Co. v. Brabzon* (Ark.), 30 R. R. R. 625, 53 Am. & Eng. R. Cas., N. S., 625.

†For the authorities in this series on the subject of the burden of proving contributory negligence of passengers, see foot-note appended to *Taillon v. Mearns* (Mont.), 10 R. R. R. 516, 33 Am. & Eng. R. Cas., N. S., 516; *Boone v. Oakland Transit Co.* (Cal.), 9 R. R. R. 601, 32 Am. & Eng. R. Cas., N. S., 601; *Brown v. New York, etc., R. Co.* (Mass.), 3 R. R. R. 143, 26 Am. & Eng. R. Cas., N. S., 143 (burden of proving due care on part of plaintiff in action for injury to passenger caused by alighting from moving train); *Louisville & N. R. Co. v. Harmon* (Ky.), 1 R. R. R. 76, 24 Am. & Eng. R. Cas., N. S., 76 (burden of proving negligence of plaintiff where it is denied that she was a passenger); *McFeat v. Philadelphia, etc., R. Co.* (Del. Sup'r Ct.), 24 R. R. R. 56, 27 Am. & Eng. R. Cas., N. S., 56 (presumption that passenger struck by train while at station exercised due care); *Jones v. United Rys. & Elec. Co.*, 13 R. R. R. 631, 36 Am. & Eng. R. Cas., N. S., 631 (burden of proving contributory negligence was on carrier where street car passenger was struck by projecting load on passing wagon); *Texas & P. Ry. Co. v. Gardner* (C. C. A.), 3 R. R. R. 759, 26 Am. & Eng. R. Cas., N. S., 759 (prima facie case of contributory negligence not established by evidence of misstep of passenger while alighting); *Indianapolis St. Ry. Co. v. Robinson* (Ind.), 23 Am. & Eng. R. Cas., N. S., 628.

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established, the burden is on it to prove the contributory negligence of the passenger.

Trial—Instructions—Refusal of Instructions Covered by Charge.—

It is not error to refuse requested instructions covered by the instructions given.

Appeal from Circuit Court, Franklin County; Jephtha H. Evans, Judge.

Action by L. P. Gilbreath against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Lovick P. Miles, for appellant.

Sam R. Chew, for appellee.

MCCULLOCH, J. Appellee boarded, at Ozark, Ark., the caboose of a local freight train, which carried passengers, for the purpose of taking passage to Altus, the next station on appellant's road. When he entered the caboose it was standing at the station, but was soon pulled down to the east end of the yards and uncoupled from the train while switching was being done. A car was backed or kicked in on the track where the caboose was standing, and struck it with such force that appellee was thrown down and received serious injuries to his person, for which he sues to recover damages. He testified that when he entered the caboose he sat down on one of the stationary seats running lengthwise of the car, and remained seated until the violent impact of the cars threw him off the seat to the floor. It threw him a distance of six or eight feet, and severely bruised his head, shoulder, and hip on the left side of his body. He testified, also, that the cars came together with great and unusual force.

Appellant proved that a printed notice was posted in the caboose warning passengers of the danger of standing up while switching was being done. The conductor and one of the brakemen testified that appellant stated to the former, immediately after the accident, that he was standing up in the caboose when the shock came, and he was thrown down. He denied having made this statement. The evidence tends to establish the fact that the conductor knew that appellee had entered the caboose as a passenger, and was in there when the other car was backed or kicked against it with extraordinary violence. But whether he actually knew of appellee's presence or not, he was operating a train which carried passengers, the caboose had just been drawn up to a station for the purpose of receiving passengers, and he, as well as all of the other trainmen, were bound to anticipate the presence of passengers aboard the caboose and to exercise care not to injure them. *St. Louis, Iron Mountain & South. Ry. Co. v. Harmon*, 85 Ark. 503, 109 S. W. 295.

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The court refused to instruct the jury, at appellant's request, that, "if the plaintiff was standing up at the time the cars came together, then, in the absence of any explanation of why or how long he was standing, he cannot recover." The instruction was properly refused. This court has repeatedly held that it is not necessarily negligence for a passenger on freight train to stand up, but that it is generally a question for the jury to decide under the circumstances disclosed in each case. *Pasley v. Railway Co.*, 83 Ark. 22, 102 S. W. 387; *Railway v. Brabbzson*, 112 S. W. 222; *Same v. Richardson*, 112 S. W. 212.

Contributory negligence is never presumed from the mere silence of the record as to the particular circumstances, but must be proved, either by direct evidence or by evidence of circumstances from which it may be inferred. A bare admission on the part of a passenger that he was standing up when injured does not make a case of negligence *per se*, nor create a *prima facie* case of negligence, so as to cast upon him the burden of proving the circumstances and clearing himself of the charge. When negligence on the part of the carrier is established by evidence, the burden is upon the carrier to prove contributory negligence of the injured passenger. *Railway Co. v. Eubanks*, 48 Ark. 460, 3 S. W. 808, 3 Am. St. Rep. 245; *Same v. Cavenesse*, 48 Ark. 106, 2 S. W. 505; *Hot Springs St. Rd. v. Hildreth*, 72 Ark. 572, 82 S. W. 245; *C., O. & G. Ry. Co. v. Doughty*, 77 Ark. 1, 91, S. W. 768.

Complaint is made at the refusal of the court to give certain other instructions asked by appellant; but we think the matters therein contained were sufficiently covered by other instructions given, and no error was committed.

Judgment affirmed.

ST. LOUIS, I. M. & S. RY. CO. *v.* GLOSSUP.

(Supreme Court of Arkansas, Nov. 16, 1908.)

[114 S. W. Rep. 247.]

Carriers—Injury to Passengers—Right of Passenger to Alight at Place Other Than Destination.*—A passenger is not required to remain aboard the train until he reaches his destination, but may, at regular stopping places, leave the train for refreshment, exercise, or other matters of convenience or necessity.

Carriers—Injury to Passengers—Right of Passenger to Alight at Place Other Than Destination.—A passenger, though his destination is other than a station announced, may accept the invitation to alight implied from its announcement, and rely upon the implied assurance of safety in alighting.

Trial—Instructions—Duty to Ask More Specific Instructions.—It is the duty of a party desiring more specific instructions to request the same.

Damages—Evidence—Sufficiency—Expectancy of Life.—To submit the question of compensation for permanent injuries, it is not required that expectancy of life shall be shown by mortuary tables; but the question may be submitted upon evidence showing the age, health, habit, physical condition, etc., of the person injured.

Damages—Excessive—Personal Injuries.—A verdict of \$8,000 for a painful and permanent injury, which not only seriously impaired plaintiff's earning capacity for life, but also disfigured him, was not excessive.

*For the authorities in this series on the subject of the right of a passenger to alight at an intermediate station, and the duties and liabilities of the carrier as affected by the fact that he did alight at such a station, before the train reached his destination, see note, 12 Am. & Eng. R. Cas., N. S., 117 (termination of relation); *Zeccardi v. Yonkers R. Co.* (N. Y.), 28 R. R. R. 771, 51 Am. & Eng. R. Cas., N. S., 771 (alighting from street car during trip does not necessarily terminate relation), *Williamson v. Central of Georgia R. Co.* (Ga.), 23 R. R. R. 57, 46 Am. & Eng. R. Cas., N. S., 57 (duty of conductor to afford passenger opportunity to alight at intermediate point, according to agreement); *Georgia Ry. & Elec. Co. v. McAllister* (Ga.), 21 R. R. R. 203, 44 Am. & Eng. R. Cas., N. S., 203 (passenger was under no duty to apply for shelter at houses in vicinity where she was induced to alight through negligence of street car conductor); note, 4 R. R. R. 217, 27 Am. & Eng. R. Cas., N. S., 217 (duties to drovers alighting at intermediate station to care for stock); *Abbott v. Oregon R. Co.* (Ore.), 16 R. R. R. 52, 39 Am. & Eng. R. Cas., N. S., 52 (rights of passengers alighting at intermediate station; and liability for negligence with respect to such station premises); *Missouri, etc., Ry. Co. v. Overfield* (Tex. Civ. App.), 12 Am. & Eng. R. Cas., N. S., 207 (alighting at intermediate station does not terminate relation); *Alabama, G. S. Ry. Co. v. Coggins* (C. C. A.), 12 Am. & Eng. R. Cas., N. S., 109 (effect of leaving car temporarily at intermediate station on relation).

St. Louis, etc., Ry. Co. v. Glossup

Appeal from Circuit Court, Drew County; H. W. Wells, Judge.

Action by Henry W. Glossup against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

T. M. Mehaffy and J. E. Williams, for appellant.

R. W. Wilson and Joe T. Robinson, for appellee.

MCCULLOCH, J. Appellee took passage at Dermott, Ark., on one of appellant's trains on the Warren branch, bound for Monticello, Ark., and sues to recover compensation for personal injuries alleged to have been received on account of the negligence of appellant's servants in charge of the train. The train left Dermott about 6 o'clock in the evening on November 15, 1906, and the coaches were crowded with passengers who had attended the circus in Dermott that day. Just before the train reached Baxter, a station about four miles distant from Dermott, the conductor, in order to gain time for the auditor to collect all the fares before stopping at Baxter, caused the train to be halted on a bridge or trestle across Bayou Bartholomew, and appellee, who was standing on the platform of the rear coach, stepped off, receiving the severe injuries complained of in this action. He alleged in his complaint, and adduced testimony tending to prove: That the rear coach, which he entered, was so overcrowded that he could not obtain a seat, and that it was unlighted; that one of appellant's employees called the station of Baxter, and the train immediately came to a stop; that he thought the stop was made for the station, and, being unable to get through the coach, he attempted to alight in order to go forward to the next coach to procure a seat. He testified that, when he started to alight, it was dark, and he looked about, but could see nothing to indicate that the train had not stopped at the station.

The evidence was sufficient to justify a finding of negligence on the part of appellant's servants in calling the station prematurely, thus inducing appellee to attempt to alight, and that he exercised due care in attempting to alight. Such a state of facts rendered appellant responsible for any injury which resulted. *M. & L. R. R. Co. v. Stringfellow*, 44 Ark. 322, 51 Am. Rep. 598; *Railway v. Johnson*, 59 Ark. 122, 26 S. W. 593; *St. L., I. M. & Sou. Ry. Co. v. Farr*, 70 Ark. 264, 68 S. W. 243; *Davis v. K. C. So. Ry. Co.*, 75 Ark. 165, 86 S. W. 995. It is insisted, however, that a different rule should prevail when a passenger attempts to alight from the train at a station which is not his destination, in reliance on a premature announcement of the station. We do not think this is a sound distinction. Appellant did not cease to be a passenger by alighting or attempting to alight from the train before he reached the end of his journey. *Ark. Cent. Rd. Co. v. Bennett*, 82 Ark. 393, 102 S. W. 198; *Par-*

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sons *v. Railroad Co.*, 113 N. Y. 355, 21 N. E. 145, 3 L. R. A. 683, 10 Am. St. Rep. 450; *Dodge v. Bangor Steamship Co.*, 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541; 2 *Hutchinson on Carriers*, § 1012. A passenger is not compelled to continuously remain aboard the train until he reaches his destination. He may, at regular stopping places, leave the train for refreshment, exercise, or other matters of convenience or necessity, provided he exercises proper care, and he does not change his status as passenger by doing so; and, when a station is announced in such a way that would amount to an invitation to other passengers bound for that station to debark, he, too, may accept the invitation and rely upon the implied assurance of safety in alighting.

The instructions given by the court at the instance of appellee are objected to on the alleged ground that they omit the idea that, before the announcement of the station he accepted as an invitation to alight when the train comes to a stop, there must be an absence of circumstances indicating that the station has not been reached. We do not think the instructions are open to this criticism; but, if they are, it was the duty of appellant to ask for instructions more specific.

The evidence tended to show that appellee's injuries were of a permanent nature. No effort was made to prove his expectancy of life by the introduction of mortuary tables, and it is insisted that the court erred in submitting to the jury the question of compensation for permanent injuries. Introduction of mortuary tables is not the only method of proving life expectancy. The question may be submitted to the jury upon testimony showing the age, health, habits, physical condition, etc., of the individual, so that the jury may estimate the probable duration of life. *K. C. Sou. Ry. Co. v. Morris*, 80 Ark. 528, 98 S. W. 363; 4 *Elliott on Railroads*, § 1813.

The amount of the verdict is questioned as being excessive. The jury assessed the amount of the damage at \$8,000, and we are of the opinion that it is warranted by the evidence. The testimony tends to establish a painful injury and a permanent one, which not only seriously impairs appellee's earning capacity for life, but also disfigured him in person.

Judgment affirmed.

CHICAGO, R. I. & P. RY. CO. *v.* STEPP *et. al.*

(Circuit Court of Appeals, Eighth Circuit, November 7, 1908.)

[164 Fed. Rep. 785.]

Railroads—Actions—Questions for Jury—Signals.—In an action for the killing or injury of a person by a railroad train at a station, where there is testimony of apparently credible witnesses who had an opportunity to observe the fact that the bell or whistle on the engine was not sounded, although such testimony is necessarily negative and although it may be contradicted by positive testimony, the question is one for the jury.

Railroads—Action for Injury of Person at Station—Questions for Jury—Rate of Speed.—Whether the running of a railroad train through station grounds at a certain rate of speed constituted negligence on the part of the company depends upon the surrounding circumstances, and, when in issue in an action for the killing of a person on the track, is a question for the jury.

Railroads—Companies Liable for Injuries—Joint Use of Track.—The fact that a railroad train owned by one company and operated by its servants, while being run over a track used jointly with another company, is subject to the rules and regulations of the latter company and the orders of its train dispatcher, does not relieve the owner from liability for an injury to a person by such train resulting from its negligent operation.

Carriers—Injuries to Persons at Station—Contributory Negligence.*—A passenger before crossing a track at a railroad station while taking or leaving a train is not required, as a matter of law, to look and listen for approaching trains, but is simply required to exercise reasonable care in the light of all the circumstances existing at the time, and whether he exercises that care is a question of fact for the jury.

Railroads—Injuries to Persons at Station—Care Required—Joint Use of Station.—A railroad company which entered into a contract entitling it to use station premises jointly with other companies came under the same duty as to passengers using the premises in connection with the other roads that it owed to its own passengers, and was required to operate its trains with the same due regard for their safety.

Railroads—Injury to Persons at Station—Liability—Negligent Operation of Train.†—A railroad company, which ran a train past a sta-

*For the authorities in this series on the subject of the contributory negligence of passengers or prospective passengers in crossing tracks to take or leave trains or cars, see second foot-note appended to *Spiking v. Consolidated Ry. & P. Co.* (Utah), 27 R. R. R. 457, 50 Am. & Eng. R. Cas., N. S., 457; fifth head-note of *Gregg v. Northern Pac. Ry. Co.* (Wash.), 28 R. R. R. 519, 51 Am. & Eng. R. Cas., N. S., 519; second head-note of *Harper v. Pittsburg, etc., Ry. Co.* (Pa.), 29 R. R. R. 650, 52 Am. & Eng. R. Cas., N. S., 650.

†See foot-note appended to *Besecker v. Delaware, etc., R. Co.*

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tion at which another train was receiving and discharging passengers at a rate of speed which in itself constituted negligence under the circumstances is liable for an injury to a person of which such negligence was the proximate cause, whether or not the particular injury that resulted could have been foreseen.

Railroads—Injury to Person at Station—Actions—Questions for Jury.†—An intending passenger walked from the platform of a railroad station across one track for the purpose of taking a train of a company which used the station jointly with defendant, then standing upon the second track and about to start. He attempted to enter on the side next the station, as was customary, as the train started, but the cars were vestibuled and the doors on that side closed, and being unable to enter he turned to go back to the station to wait for another train, when he was struck and killed by a train of defendant on the intervening track which was running at a speed of 40 or 50 miles an hour. Held, in an action to recover for his death, that he was a passenger with all the rights of one on the station grounds, and that the questions of defendant's negligence in the manner of running its train and of the contributory negligence of the deceased were properly submitted to the jury.

In Error to the Circuit Court of the United States for the Western District of Missouri.

For opinion below, see 151 Fed. 908.

On March 14, 1906, James M. Stepp, the father of the plaintiffs below, was struck and instantly killed by a train of the Chicago, Rock Island & Pacific Railway Company, the plaintiff in error, on the depot platform at Randolph, Mo., a suburban station accommodating 400 or 500 people, and located seven miles east of the Union Depot in Kansas City. The trains of three railway systems, the Wabash Railway Company, the Chicago, Burlington & Quincy Railway Company, and the Chicago, Rock Island & Pacific Railway Company, are operated past this station, jointly, over two main tracks. These tracks run east and west. The north track, owned by the Burlington Company, was used for west-bound trains, and the south track, owned by the Wabash Company, was used for east-bound trains. The plaintiff in error did not own either of the tracks, but, under the terms of a running agreement with the Burlington Company, had the right to operate its trains between Kansas City and Cam-

(Pa.), 30 R. R. R. 358, 53 Am. & Eng. R. Cas., N. S., 358; fourth head-note of *Pere Marquette R. Co. v. Strange (Ind.)*, 30 R. R. R. 66, 53 Am. & Eng. R. Cas., N. S., 66.

†See first foot-note appended to *Powell v. Philadelphia & R. Ry. Co. (Pa.)*, 30 R. R. R. 536, 53 Am. & Eng. R. Cas., N. S., 536; fifth head-note of *McFeat v. Philadelphia, etc., R. Co. (Del.)*, 30 R. R. R. 254, 53 Am. & Eng. R. Cas., N. S., 254; first foot-note appended to *Pere Marquette R. Co. v. Strange (Ind.)*, 30 R. R. R. 66, 53 Am. & Eng. R. Cas., N. S., 66.

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eron Junction over the tracks of the Burlington Company, and over the joint track at Randolph. While using these tracks Rock Island trains were controlled by the rules and regulations of the Burlington Company, and were subject to the direction of its train dispatchers and other agents having control of the movement of trains. The station at Randolph is situated immediately south of the tracks. In front of it, and extending in an easterly and westerly direction parallel with the tracks and level therewith, was an ordinary depot platform 186 feet long and 8 feet wide. Immediately north of the north track, and level therewith, was an open platform, without cover of any kind, 96 feet long and 6 feet wide. Extending from the depot platform due north across the tracks, and across two switch tracks north of the main track, was a narrow platform or walk 15 feet wide, level with the tracks, and connecting the two platforms. On either side of this walk the space between the two platforms was filled with cinders flush with the track, and passengers going to and from trains were accustomed to walk over these cinders the same as upon the narrow walk just referred to. The space between the main tracks was 10 feet, about 4 feet of which would be covered by the overlapping of cars. Notwithstanding the north platform, passengers were accustomed to get on and off trains on the north track on the south side. The deceased was a farmer living a mile or more east of Randolph. On the morning of the accident he had sent his son to Kansas City with a load of hogs to be sold on the market at the stockyards there. He himself intended to go to the city on the Burlington train which passed Randolph about 7:30 in the morning, to meet his son and look after the sale. He approached the station on a road from the east running parallel to and near the tracks. This road crosses the tracks at a point about 380 feet east of the center of the depot platform. When he reached that point he continued westward along a well-beaten cinder pathway south of the main track to the east end of the platform immediately in front of the depot and south of the tracks. As he reached the depot the west-bound Burlington train, which he intended to take, pulled in and stopped. It consisted of six coaches, and was about a block and a half long. The locomotive was at a point between 70 and 100 feet west of the depot. It was emitting smoke and steam. The morning was misty, and the wind in the northeast, so that the smoke and steam from the locomotive was blown down across the south track. On this track a Rock Island train was approaching from the west. Mr. Stepp crossed the south main track from the south platform, and endeavored to get aboard the Burlington train. He had the money to pay his fare, and intended in good faith to become a passenger. He found that he was at a vestibule car, and the door was closed. He then hurried forward to the next car plat-

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form, but this, too, was vestibuled and closed. The train was then moving out. He seized hold of the handholds and tried to get in while the train was in motion. The conductor or some other employee of the road was on the car platform, and some conversation passed between him and Mr. Stepp, but there is no trustworthy evidence as to what was said. Then Mr. Stepp abandoned his effort to gain admittance, and turned to go south to the station to wait for the next train. The second step brought him upon the south track, where he was struck by the Rock Island train, which was running through the depot grounds at a speed of from 40 to 50 miles an hour. The railroad track on which this train approached the station was straight, and the view along it unobstructed by permanent objects for a distance of a mile and a half or two miles.

The plaintiff charges the defendant with negligence in two particulars: First, that no bell was rung or whistle sounded by its train as it approached the station; and, second, that the train was running at a negligent rate of speed, not only in violation of law, but in violation of the rules of the company. At the close of all the evidence the defendant moved the court to direct a verdict in its favor. The refusal to grant that motion constitutes the only error assigned in this court.

Paul E. Walker (*M. A. Low*, on the brief), for plaintiff in error.

W. C. Scarritt (*E. L. Scarritt* and *Elliott H. Jones*, on the brief), for defendants in error.

Before *HOOK* and *ADAMS*, Circuit Judges, and *AMIDON*, District Judge.

AMIDON, District Judge (after stating the facts as above). There is the usual conflict in the evidence as to whether the signals were given, and in the briefs there is the familiar discussion of the relative weight of negative and positive evidence. In following out this distinction courts have sometimes overlooked the fundamental fact that in such a case the plaintiff is necessarily confined to negative evidence. If such evidence is unworthy of belief simply because it is negative, then the plaintiff must nearly always fail. The fact which he has to prove is negative, viz., that the bell was not rung or the whistle sounded; and the only way that fact can be established is to bring witnesses who were so situated that they would have heard the signals if they had been given, and who testify that they did not hear them. Such evidence, of course, ranges through all degrees of credibility. If the witness had been accustomed to hear such signals frequently so that their impression would be deadened by habit, his testimony that he did not hear them would have no weight as against trustworthy affirmative evidence that the signals were

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given, unless the witness was able to testify to some circumstance showing that his attention was specially directed to the subject on the occasion in question. Again, if a witness situated so he could hear the signals, and of such experience that he would have been likely to notice them if they had been given, testifies that he did not hear them, the credibility of his evidence is for the jury, unless there is proof that his attention at the time was absorbed in some other matter. Finally, if the attention of a witness is especially directed to the train and its signals, and at the time a distinct impression is made upon his mind that the signals are not given, his testimony is in every particular as trustworthy, though negative, as would be the evidence of another witness similarly situated affirming that the signals were given. In either case the truth or falsity of the evidence depends upon the truthworthiness of the sense of hearing and the honesty of the witness testifying to the fact. It is likewise true that affirmative evidence on such a subject does not prove the fact simply because it is affirmative. It is subject to all the infirmities, bias, and interest to which all human testimony is subject. Such evidence is also frequently given by trainmen, who are accustomed to give the signals and to hear them. It is their habit to give such signals on approaching stations and highway crossings. The mere habit is likely to blur the memory of the fact. But after an accident has occurred nothing is more natural than for the memory of a trainman, unconsciously and by a well-recognized mental illusion, to raise a recollection of the giving of the signal, out of his previous habitual practice. That the signal was given springs up in his mind, not by a process of recollection, but as the result of a long-continued habit. This truth is well illustrated in the present case. The engineer of the Burlington train knew nothing of the accident at the time it occurred. He did not hear of it until some 25 minutes later, after reaching Kansas City. In the meantime he had necessarily heard numerous locomotive bells. His opportunity to observe the ringing of the bell on the Rock Island train was meager. His own train was just starting up, with the attendant noises of his locomotive. The Rock Island train swept by him at a speed of from 40 to 50 miles an hour. Still he testifies that looking through the cab window opposite him he saw the bell on the Rock Island locomotive swinging as it passed his cab. No circumstance is mentioned why this fact, which would be a usual occurrence in passing locomotives, and would have ordinarily made no impression upon his mind, did so impress his attention on the occasion in question that he was able to recall the fact after the accident. Affirmative evidence subject to so many possibilities of error is, of course, no more trustworthy than negative evidence. In the present case there were seven witnesses who testified that the signals were not

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given. Some of them were in a position especially favorable for observing the fact if it had occurred, and two of them at least had their attention directed to the train as it approached the station. In opposition to this evidence two witnesses on behalf of the defendant testified that the bell was rung. One was the engineer of the Burlington train, and the other was a witness standing in the station who said that he noticed that the Rock Island bell was swinging as the train passed by, although at that very time his eyes were also fixed upon Mr. Stepp's peril and death. Such a conflict of evidence surely was for the consideration of the jury. As to the sounding of the whistle for the station, the conflict in the evidence is much more favorable to the defendant. Witnesses testified to circumstances which make it altogether probable that the station whistle was sounded. But such a warning of the approach of a train to a station where another passenger train is standing, and to and from which passengers are likely to be moving, would be a wholly inadequate warning of the danger. The attention of passengers under such circumstances is diverted by the necessary confusion which is always present on such an occasion, and a train which should pass rapidly through station grounds without giving a constant warning of its approach by the ringing of the locomotive bell would be manifestly guilty of negligence. We are, therefore, satisfied that the trial court committed no error in submitting this issue to the jury.

It was also for the jury to say whether the defendant was guilty of negligence in running its train past the station at the high rate of speed which is admitted. Our attention is called to numerous cases in which it is stated that railroads are themselves to be the judges of the speed at which they will run their trains, and that their judgment as to the proper requirements on this subject cannot, as a matter of law, be held to constitute negligence. In the cases in which the language was used the situation involved the speed of trains in the open country, and as to those situations the language was entirely proper. But negligence depends upon circumstances. It is too plain for controversy that railroads cannot be given an unrestricted discretion as to the speed at which they will run trains through station grounds. At such points railroads must operate their road with due regard to the safety of the public, and, if the matter were to be determined as a matter of law, we should have no hesitancy in saying that it was plainly negligent for the defendant to run its train past the station at Randolph, under the conditions existing there at the time, at the speed of 40 miles an hour. If such a speed is necessary, then the company was bound to safeguard the public by gates and signal men. Rule 10 of the Burlington Company was binding upon this train, and clearly forbade such a speed. It reads as follows:

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"When passenger trains are receiving or discharging passengers at stations on double track or at points where they meet or pass other trains, all trains must approach under complete control."

It is seriously urged that if the trainmen in charge of the Rock Island train were guilty of negligence, either in the speed of the train or in omitting to give signals, the defendant cannot be held liable for their negligence, because while running upon these joint tracks they were subject to the rules and regulations and the train dispatchers of the Burlington road. As to this contention it may first be answered that the speed of the train was the customary speed of all such trains at that station, and must therefore, be held to be the act of the defendant, and not of its agents. We would not, however, wish to rest our decision upon that ground alone. We are clearly of the opinion that the circumstances put forward to exempt the defendant from liability cannot be given any such effect. The fact that the train was run subject to the rules and regulations of the Burlington Company, and under the direction of its train dispatchers, did not make the Rock Island train a Burlington train, or its trainmen the servants of the Burlington road. This requirement grew out of the fact that two roads were using the same track at the same time. It was necessary that there should be a single authority to control the movement of the trains in order to secure safety in the operation of the road. That was the entire scope and effect of this requirement. The train was at all times a Rock Island train, and the employees upon it were its employees. That company had purchased the right by contract to run its trains over the track in question. The requirement that the employees should act under the rules and train dispatchers of the Burlington was simply an arrangement whereby they could efficiently and safely perform their service for the Rock Island Company. The authority mainly relied upon by the defendant in support of its position is *Atwood v. Chicago, Rock Island & Pacific Ry. Co.* (C. C.), 72 Fed. 447. We cannot approve of that decision in its holding as to the liability of the Rock Island Company upon the facts there disclosed. We think the learned judge who rendered the decision attached undue importance to the fact that the Rock Island trainmen there were subject to the rules and regulations and the train dispatcher of another company. Who has the right to control the conduct of an employee, is perhaps the most important circumstance in deciding the question as to whose servant he is. It is decisive in cases to which it has been most frequently applied, namely, where the servant is at the same time in the general employment of one person, and the special employment of another. Such was the case of *Donovan v. Construction Syndicate* (1893), 1 Q. B. 629. There the defendants, who were the owners of a crane, lent it to an-

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other company, with an operator in their employ to run it. While using the crane in the service of the hirers, the operator was subject to their exclusive control and direction. For this reason it was held that while engaged on the machine for them he was their servant, and not the servant of the owners, although he was hired and paid by them. Chief Justice Cockburn, in *Rourke v. Colliery Co.*, 2 C. P. Div. 205, states accurately both the rule and the circumstances to which it is applicable, as follows:

"When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

In order to render one person the servant of another, however, he must be in some way, either generally or specially, actually in the service of that other—working for him. Judge Taft, speaking for the Court of Appeals for the Sixth Circuit, in *Byrne v. Kansas City, Ft. Scott & Memphis Railway Co.*, 61 Fed. 605, 607, 9 C. C. A. 666, 24 L. R. A. 693, brings both requirements together when he asks in regard to an employee: "Whose work was the servant doing?" and "Under whose control was he doing it?" The employees in charge of the Rock Island train were not working for the Burlington Company; it did not employ or have any right to discharge them; it owned no part of the train upon which they were working; and, finally, it had no interest, either by way of contract or ownership, in the service which they were performing. They were not, therefore, its servants, notwithstanding, for purposes of safety to its own trains, they were subject to its rules and direction. The duty to make reasonable rules and regulations, and to exercise reasonable supervision by means of train dispatchers, was the positive duty of the Rock Island Company—a duty which it owed both to its employee and the public. It could not delegate that duty to another, and, when by agreement it placed its trains under the rules and regulations and the train dispatchers of the Burlington Company, it still remained as responsible for those rules, regulations, and directions as it would have been if they had been made or given by itself. Again, it would be a dangerous doctrine to permit a railroad company, when charged with wrongful conduct, to escape liability upon the ground that the act was done pursuant to the rules and directions of another company to which it had by previous agreement delegated authority. Such a holding would permit the direction of a third party to be set up as a justification for a tort in its most vicious form. It might be that if the Burlington Company had, either by its rules or its train dispatcher, directed the doing of the very act complained of, it, as well as the Rock Island Company,

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would be liable in damages; but surely the Rock Island Company could not be heard to plead those facts in exoneration of its own wrong.

The case of *Smith v. St. Louis & San Francisco Railway Co.*, 85 Mo. 418, 55 Am. Rep. 380, when fully examined, will be found to rest upon different and satisfactory grounds. There the Missouri Pacific Road entered into an agreement with the defendant in that case by which the former agreed to transport all of the passenger trains of the latter passing between the Union Station at St. Louis and the substation of Franklin, using for that purpose its own locomotive and crew, the San Francisco road simply furnishing the cars and the brakeman and conductor. The San Francisco Company was to do no business between the stations mentioned, or intermediate stations. The plaintiff bought a ticket of the Missouri Pacific Company to ride from the Union Station in St. Louis to Webster, an intermediate point, and took passage on a car owned by the San Francisco Company, and hauled by the Missouri Pacific under this agreement. The circumstances of the accident are stated in the opinion as follows:

"The train arrived at Webster about 10 o'clock at night, and stopped at the depot for passengers to get on and off. It was a dark night, and the depot was not lighted, and in the act of getting off, or immediately after getting off, Smith fell between two of the cars, and at that moment the train started, and passing over him inflicted injuries of which he died soon after, and his widow instituted this suit against the defendant to recover damages. The negligence alleged is that the train did not stop long enough to allow the deceased reasonable time to alight, and that the depot was not lighted."

Under all these circumstances it is entirely plain that the Missouri Pacific Railroad Company, and not the San Francisco Company, was responsible. Smith was its passenger. It was hauling the train and controlling its movements, and was entitled to all its earnings while passing over its road. It is not necessary to recount the circumstances of the present case to show that it is controlled by considerations fundamentally different from the case there involved.

The defense that the Burlington road, and not the Rock Island, was responsible for the negligence complained of, was in no way embodied in the answer, nor was it presented to the trial court. On the contrary, the answer admits that the defendant "was at all the times mentioned in the petition engaged in operating a railroad in the state of Missouri." It further admits that it "and other railroad companies were accustomed to and did run, conduct, operate, and manage cars and trains of cars" over the track in question, and admits "that the said James M. Stepp was struck and killed by a locomotive engine of this de-

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fendant," and admits that defendant, Louis Collier, was upon said engine, and operating the same "as the agent of this defendant, at said time and place." In the face of these admissions, even if there were merit in the defense itself, the defendant is precluded from urging it.

Was the deceased guilty of contributory negligence in failing to look and listen before attempting to cross the track upon which he met his death? It is conceded that he took neither of these precautions. If, however, he was entitled to the rights of a passenger while on the platform, he was not required to do so. It is now the settled rule of the federal courts that passengers using station premises for the purpose of taking or leaving trains have a right to assume that the place is one of safety, and to act upon that assumption. While they are not absolved from all care, they are not required to exercise that high degree of care which the law imposes upon travelers when approaching the intersection of a highway and a railroad. The traveler upon the highway has no right to assume that the railroad is a place of safety, or that trains will not be run over it while he is attempting to pass. On the contrary, the rule has been repeatedly declared that such a crossing is a place of danger, and that the traveler must approach it with the knowledge that the company may at any time be moving trains over its road. This is the ground of the difference between the rule as to a passenger while upon station grounds and a traveler upon the highway. The one has the right to believe that the place which he is using is one of safety, while the other is bound to know that the place which he is approaching is one of imminent danger. Upon the basis of this difference the rule is now firmly established that a passenger, before crossing a track while taking or leaving a train, is not required, as a matter of law, to look and listen for approaching trains. He is simply required to exercise reasonable care in the light of all the circumstances existing at the time, and whether he exercises that care is a question of fact for the jury. *Warner v. Baltimore & Ohio R. Co.*, 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491; *Alabama & Great Southern Ry. Co. v. Coggins*, 88 Fed. 455, 32 C. C. A. 1; *Graven v. MacLeod*, 92 Fed. 846, 35 C. C. A. 47; *Chesapeake & Ohio Ry. Co. v. King*, 99 Fed. 251, 40 C. C. A. 432, 49 L. R. A. 102. This rule is based upon the soundest considerations of public policy. While taking or leaving a train, the attention of passengers is necessarily absorbed in a multitude of considerations which make it impossible for them to exercise a careful watchfulness for approaching trains. There is usually considerable noise at such places. Frequently there is the meeting or leaving of friends. As a rule there is also haste and confusion. These and many other familiar circumstances confuse the mind, and render watchfulness impossible. The situation of Mr. Stepp

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is itself an impressive illustration. He arrived at the station a little late, and hastened to take the train. He rushed from one platform to another to enter, but found all entrance to the train barred. With his mind bewildered by his experience, he turned to go to the depot to wait for the next train, and was immediately struck and killed. All the circumstances mentioned were such as would throw the ordinary person off his guard, and to hold that one so situated ought to exercise the same care as a person approaching a highway crossing would be to confound situations that are fundamentally different and encourage carriers to disregard the safety of the public. The defendant attempts to withdraw the present case from the rule we have been considering upon the ground that Mr. Stepp was not a passenger as to the Rock Island Company at the time of the injury, and relies upon *Chattanooga, R. & S. Ry. Co. v. Downs*, 106 Fed. 641, 45 C. C. A. 511, *McCann v. Chicago, Milwaukee & St. P. Ry. Co.*, 105 Fed. 480, 44 C. C. A. 566, and *Elliott v. Chicago, Milwaukee & St. P. Ry. Co.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068, in which the courts have declined to extend the exemption in favor of passengers to employees or licensees. In our judgment Mr. Stepp had the rights of a passenger not only as to the Burlington road upon which he was intending to take passage, but as to all carriers operating trains through the station grounds. When the defendant entered into a contract entitling it to use the depot premises jointly with the other roads, it came under the same duty as to passengers using the premises in connection with other roads that it owed to its own passengers. Rule 10, already quoted, imposed that duty upon it. It was bound to know that passengers upon other roads would be using the premises, and to operate its trains accordingly. Mr. Stepp also had a right to assume, while properly using the depot premises, that the defendant would discharge its duty in this respect, and that no train would be driven over its tracks at a speed of 40 miles an hour at a time when passengers to or from the Burlington train were upon the platform. His right did not grow out of the contract of carriage, save only as that contract gave him the right to be upon the premises. Being there rightfully as a good-faith passenger, he had the right to assume that all carriers using the premises would have the same regard for his safety as the carrier upon whose road he was seeking passage. Having failed to secure entrance to the train, he did not cease to be a passenger, but had all the rights of a passenger while returning to the depot for the purpose of waiting for the next train. At the time of his injury, therefore, he was clearly within the class which is exempt from the rule as to looking and listening for other trains, and his failure to take that precaution cannot be assigned as negligence on his part as a matter of law. The trial court, in a charge to which no

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exceptions were reserved, submitted to the jury the question whether Mr. Stepp was in the exercise of reasonable care. It would have been manifest error for it to withdraw the case from the jury and declare as a matter of law that the deceased was guilty of contributory negligence.

Deceased was not negligent in attempting to enter the train from the south side. The evidence shows that it was a regular practice of the traveling public to do this. No sign indicated that the north platform must be used in taking west-bound trains, nor did any employee point out that as the proper course. The construction of the depot ground afforded the only indication of the proper approach to trains, and that was quite consistent with the course adopted. The station was situated south of the track. That was the place where passengers were compelled to purchase their tickets, and where they would naturally wait for trains to pull in to the station and stop before attempting to take passage. It would have been unreasonable to expect the traveling public on a misty morning like the morning in question to take a stand upon the open platform and wait for an incoming train. There is no evidence that Mr. Stepp was aware that the cars were vestibuled and could be entered only from the north side. His conduct clearly indicates a different belief on his part.

Finally, it is insisted that the defendant ought not to be held liable because its engineer with an open track before him could not anticipate that deceased would step on the track immediately in front of the train. That, however, is not the test of defendant's liability. Its conduct in running its train past the station at 40 miles an hour while another passenger train was there receiving and discharging passengers was negligent, and the death of Mr. Stepp was the direct and proximate result of that negligence. The defendant is liable whether it could have foreseen the actual consequence of its negligence or not. The distinction made by Judge Mitchell on this subject in *Christianson v. Chicago, St. P., M. & O. Ry. Co.*, 67 Minn. 94, 69 N. W. 640, is clear and sound. Of a similar contention he said:

"The doctrine contended for by counsel would establish practically the same rule of damages resulting from tort as is applied to damages resulting from breach of contract, under the familiar doctrine of *Hadley v. Baxendale*, 9 Exch. 341. This mode of stating the law is misleading, if not positively inaccurate. It confounds and mixes the definition of 'negligence' with that of 'proximate cause.' What a man may reasonably anticipate is important, and may be decisive in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person has no reasonable ground to anticipate that a particular act would or might result in an injury to anybody then, of course, the act would not be negligent at all; but if the act itself is neg-

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ligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow. Bevan, Neg. p. 85 (3d Ed.); Hill v. Winsor, 118 Mass. 251; Smith v. Railway Co., L. R. 6 C. P. 14. For citation of cases on this question, see 16 Am. & Eng. Enc. Law, p. 436 et seq.; also Sher. & R. Neg. § 28 et seq."

Lord Justice Blackburn stated the same rule tersely in the leading case of Smith v. London & Southwestern Ry. Co., L. R. 6 C. P. 14:

"What the defendants might reasonably anticipate is only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence."

On all its issues this case is one eminently proper for the decision of the jury. It was submitted on a charge to which no exception was reserved, and the judgment in favor of the plaintiffs must be affirmed.

KEIFNER *v.* PITTSBURG, C., C. & ST. L. RY. CO.

(Supreme Court of Pennsylvania, Jan. 4, 1909.)

[72 Atl. Rep. 253.]

Carriers—Carriage of "Passengers"—Who Are Passengers.*—A person who has purchased a ticket for his transportation and is at the station awaiting arrival of the train is a passenger, and entitled to the company's protection as such.

Carriers—Carriage of Passengers—Intervening Tracks at Station.—It is the duty of a carrier to provide a reasonably safe passage over tracks intervening between a station and a train, and not to permit locomotives to pass over them while passengers are crossing.

Carriers—Carriage of Passengers—Intervening Tracks at Station.—Where a passenger is required to cross a track to reach his train from the station, he is entitled to assume that his safety will not be endangered by permitting a train to pass on the intervening track, and his duty to stop, look, and listen is not the same as that of a person about to cross a public crossing.

Carriers—Carriage of Passengers—Intervening Tracks at Station—Questions for Jury.—In an action for the death of a passenger who was struck by a train while attempting to cross an intervening track upon the planked way provided for the use of passengers, to reach his train from the station, whether he was guilty of contributory negligence held for the jury.

Appeal from Court of Common Pleas, Allegheny County.

Action by Maria Keifner, in her own right and for the use of John Keifner, and others, against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for defendant non obstante veredicto, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. C. Stillwagon, and *Pier Dannals*, for appellant.

Wm. S. Dalzell, for appellee.

MESTREZAT, J. We are all of opinion that the court below erred in entering judgment for the defendant non obstante veredicto.

The defendant company's station at Carnegie is on the south side of its four tracks of railroad which run east and west and parallel each other at that place. The track next the station is the east-bound passenger, the next track, 15 feet distant, is the west-bound passenger track, and the two tracks beyond are for freight traffic. The station platform extends to the rail of the eastbound track, is 8 or 9 feet wide, and about 150 feet long.

*See preceding case and foot-notes.

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Three or four steps lead from the door of the station down to the platform. There is a track platform between the west-bound and the east-bound tracks from which passengers enter and on which they alight from the west-bound train. At this point the space between the rails of the east-bound track is planked for a distance of about 30 feet. This is the way provided by the company for passengers to enter a west-bound train from the station and for passengers alighting on the platform between the west-bound and east-bound tracks to enter the station. There is a gong in the station, operated by an electric button in an adjoining telegraph tower, which gives notice of trains approaching the station. On the morning of December 3, 1901, John Keifner, appellant's husband, went to the station at Carnegie to take a west-bound train for Iffley, a station three miles west of Carnegie. It was due at 7:05. While he was at the window purchasing his ticket, the gong sounded giving notice of the approach of the west-bound train, and the ticket agent immediately announced to Keifner and the other 12 or 15 passengers intending to take that train, "Train going west." Keifner and the other passengers started at once on the announcement of the agent for the platform from which the west-bound train was to be entered. They passed through the door leading out of the station, and down the steps to the station platform. Keifner was in advance of the other passengers, and as he was about stepping from the planks between the rails of the east-bound track to the track platform from which he was to enter the west-bound train, he was struck and killed by an express train going east on the east-bound track, running from 25 to 30 miles an hour. This train was 27 minutes late. The ticket agent testified that from the time the gong sounded it requires about a minute and a half to two minutes for the train to reach the platform. On the trial of the cause, the court submitted to the jury the negligence of the defendant company and also the contributory negligence of the deceased. The jury returned a verdict for the plaintiff, but the court entered judgment for the defendant non obstante veredicto, citing as authority for its action the cases of *Carroll v. Pennsylvania Railroad Company*, 12 Wkly. Notes Cas. 348, and *Irey v. Pennsylvania Railroad Company*, 132 Pa. 563, 19 Atl. 341. The learned judge held that as matter of law the deceased was guilty of contributory negligence under the facts of the case.

This case is ruled by the doctrine announced in *Harper v. Pittsburg, etc., Railroad Company*, 219 Pa. 368, 68 Atl. 831, and *Besecker v. Delaware, etc., Railroad Company*, 220 Pa. 507, 69 Atl. 1039, 123 Am. St. Rep. 714. There, as here, the only question presented for the consideration of this court was whether the plaintiff's negligence was so clear that the court was justified in declaring it as matter of law. The deceased having purchased a ticket for his transportation, and being in the de-

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fendant's station awaiting the arrival of the train, was a passenger, and entitled to the company's protection until he entered the train. It was therefore the duty of the defendant company to use care in providing a safe way or approach to the platform from which its west-bound train could be entered. His right to a safe transit over the east-bound track is the same in attempting to reach his train from the station as a passenger who, having alighted from a train, attempts to cross intervening tracks to enter the station. There is a positive duty imposed upon the company in such cases to provide a reasonably safe passage over intervening tracks, and not to permit locomotives or trains to pass over them while passengers are on the crossing. Negligence in the performance of this duty will subject the company to liability for any resulting injury.

The deceased had a right to assume that his safety would not be endangered by permitting a train to pass on the east-bound track while he was crossing to enter the west-bound train, and he could rely upon the company to keep the track clear. *Harper v. Pittsburg, etc., Railroad Company*, 219 Pa. 368, 68 Atl. 831; *Besecker v. Delaware, etc., Railroad Company*, 220 Pa. 507, 69 Atl. 1039, 123 Am. St. Rep. 714. His duty therefore to stop, look, and listen was not the same as a footman about to cross at a public crossing. *Pennsylvania Railroad Co. v. White*, 88 Pa. 327; *Betts v. Lehigh Valley R. R. Co.*, 191 Pa. 575, 43 Atl. 362, 45 L. R. A. 261; 6 Cyc. 608. While he was required to exercise prudence and care in crossing the east-bound track, it was such care as the circumstances demanded. Had he been attempting to cross a railroad track at a public crossing, the failure to stop, look, and listen would have been negligence to be declared by the court. There the railroad company has the right to run its trains at any time it sees proper, and persons who attempt to cross the track are required to look out for approaching trains. Under those circumstances the company does not invite the public to cross its tracks for any purpose, nor if its employees in charge of a train exercise care in approaching a crossing is it under obligation to protect the public from injury while crossing the tracks; but here the circumstances are different. In effect the company, by providing this means of access to its trains, makes the crossing a part of its station so far as its duty to protect the passenger is concerned. The public have no right to cross it except when they, as passengers, intend to take passage on the company's west-bound train. Here the way used by the deceased was specially provided by the company for crossing its tracks. Plank 30 feet in length had been laid between the rails of the east-bound track so as to make a proper and safe way for passengers to walk from the station to the track platform of the west-bound track. This was the only way provided by the defendant company for passengers to reach the west-bound train,

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and therefore every passenger who had purchased a ticket at the station for that train was invited by the company to cross the track by this way to reach the train.

The announcement of the arrival of the west-bound train by the ticket agent was a direction to the passengers in the station to proceed to the train. All the passengers in the station so treated the announcement and acted upon it accordingly. They had a right to assume that the approach to the train was reasonably safe, and they were not bound to anticipate that their safety would be endangered by the company permitting a train to be run over the crossing on the east-bound track at this time. They could rely upon the performance of the company's duty not to permit a train to pass on that track. In fact there was no train due on the east-bound track at that time, and Keifner's death was caused by a train running 27 minutes late. He was not struck when he stepped upon the track, but he was in the act of stepping from the track when he was hit by the locomotive. He manifestly thought that he could cross the track in safety, and there is nothing in the evidence to show the contrary. The other passengers saw this train and avoided a collision, but they were in the rear of the deceased and had an opportunity to do what he did not have. Of course, if he had stopped and waited on the platform to see whether the east-bound track was clear or not, he would not have been run down by the train; but, in the absence of evidence showing that he saw the train approaching and had reason to believe that his safety would be endangered, he might rely upon the presumption that the company would do its duty, and proceed to the train as he was directed by the company's agent. The care required of him was such as the circumstances demanded, and whether he exercised that care or not a jury must determine. If, when the deceased arrived on the station platform at the east-bound track, the train was approaching at a high rate of speed, and so near the crossing that he should have known that it intended to pass the crossing, he should not have attempted to cross in front of it. In other words, if a reasonably prudent man would have anticipated danger in crossing from the conditions as they existed there, it was negligence in the deceased to attempt to make the crossing. These were questions for the jury.

The cases relied upon by the court below have no application to the facts of this case. In the Carroll Case the plaintiff when injured was crossing the railroad "at the Queen street crossing, which adjoins the depot on the west." He stepped directly in front of the locomotive, which, if he had used his sense of sight or hearing, he would have known was approaching. His duty was to stop, look, and listen, which manifestly, if he had done, he would not have been struck by the locomotive. In *Irey v. Penna. Railroad Company*, 132 Pa. 563, 19 Atl. 341, the de-

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ceased attempted to reach his train by crossing the tracks at a different place than that provided by the company. A nonsuit was entered, which was sustained by this court in a per curiam opinion. In the opinion of the trial judge it is said (page 565 of 132 Pa.): "If the accident had happened while the deceased was walking upon the planked way leading from the station to the platform on the opposite side, the question of contributory negligence would have to be decided by the jury, and not by the court; but, unfortunately for the plaintiff, this was not the case. He left a place of comparative safety, and without any invitation, actual or implied, he attempted to reach his train before it was ready to receive him, and by a way much more dangerous than the one provided for him by the company." Keifner was killed when he, by the implied invitation of the company, was walking upon the planked way prepared by it for the use of passengers intending to board a train from the platform on the opposite side of the east-bound track.

The assignment of error is sustained, the judgment of the court below is reversed, and judgment is now directed to be entered on the verdict for the plaintiff.

CLEVELAND, C. & ST. L. RY. CO. *v.* HOLLOWELL.

(Supreme Court of Indiana, June 11, 1909.)

[88 N. E. Rep. 680.]

Appeal and Error—Harmless Error—Sustaining Demurrer to Pleading.—Where a carrier, sued for damages for breach of its common-law duty to safely carry and deliver a car load of sheep shipped over its line by the plaintiff, could raise the defense of a special contract limiting its liability under the general denial also pleaded, the error, if any, in sustaining a demurrer to a paragraph in the answer setting up such contract, is harmless.

Carriers—Carriage of Live Stock—Limitation of Liability.*—The duty of a common carrier is to carry all goods of the kind it professes to carry and insure the safety thereof while in its custody, and the owner may demand that such property be carried under the common-law liability, and a contract limiting such liability, to which he is obliged to assent in order to secure transportation, is of no effect, and where a contract was prepared by a carrier's agent on one of the forms furnished by the carrier and tendered the shipper of a car

*See extensive note, 28 R. R. R. 384, 51 Am. & Eng. R. Cas., N. S., 384; second head-note of *Cleveland, etc., Ry. Co. v. Louisville, etc., Co.* (Ky.), 30 R. R. R. 672, 53 Am. & Eng. R. Cas., N. S., 672; foot-note of *Harris v. Great Northern Ry. Co.* (Wash.), 30 R. R. R. 266, 53 Am. & Eng. R. Cas., N. S., 266.

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load of sheep, and that is the only form of contract that is in use at the station from which he shipped his sheep, and the agent at such station had no authority to make any other contract for the shipment of the sheep at a different consideration whereby the risk would not be assumed by the shipper, such contract may be disregarded in determining the liability of the carrier in an action to recover for breach of its common-law duty to carry the shipment safely.

Constitutional Law—Determination on Constitutional Questions.—The Supreme Court will not pass upon the constitutional validity of a statute, where it can properly rest its decision on other grounds.

Appeal from Circuit Court, Hendricks County; John C. Robinson, Special Judge.

Action by Robert T. Hollowell against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Leonard J. Hackney and Frank L. Littleton, for appellant.
Cofer & Dougan and Brill & Harvey, for appellee.

MONKS, J. This action was brought by appellee against appellant to recover damages for an alleged breach of its common-law duty to safely carry and deliver a car load of sheep. The first paragraph alleged a contract to carry to Chicago, Ill. The second paragraph is the same as the first, except it alleged a contract to carry to Terre Haute, Ind., and there to deliver to another carrier, whose line ran from Terre Haute to Chicago, Ill. Appellant filed an answer to the complaint in four paragraphs; the first paragraph being a general denial. Appellee's demurrer for want of facts to the second, third, and fourth paragraphs of answer was sustained to the second and fourth paragraphs and overruled as to the third paragraph of answer. Trial by the court, special finding of facts made, and conclusion of law stated thereon in favor of appellee, and, over a motion for a new trial, judgment against appellant. The errors assigned and not waived call in question the conclusion of law and the action of the court in sustaining appellee's demurrer to the second and fourth paragraphs of answer. The second paragraph of the answer set out at length a written contract between appellant and appellee for the transportation of appellee's sheep, which limited appellant's common-law liability and alleged that the said contract was the sole and only contract for the transportation of said sheep. The fourth paragraph of answer was substantially the same as the second.

It is insisted by appellant that the action of the court in sustaining the demurrer to the second and fourth paragraphs of answer was erroneous for the reason that the act of 1905 (Acts 1905, p. 58, c. 47, being sections 3918-3920, Burns' Ann. St.

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1908), entitled "An act relative to the liability of common carriers and prescribing the practice and procedure and fixing the burden of proof in certain cases," is in violation of that part of section 22, art. 4, of the Constitution of this state, which forbids the enactment of laws "regulating the practice in courts of justice," and therefore void, and for the further reason that it is in violation of the fourteenth amendment of the Constitution of the United States. Before the taking effect of said act of 1905 (Acts 1905, p. 58, c. 47), it had been uniformly held by this court that when a shipper sues on the common-law liability, and it appears that there was a written contract, the shipper could not recover, on account of failure of proof. , Section 402, Burns' Ann. St. 1908, and notes; section 396, Burns' Ann. St. 1901, and notes; *Barlett v. Pittsburg, etc., Co.*, 94 Ind. 281, 284; *Indianapolis, etc., R. Co. v. Remmy*, 13 Ind. 518; *Jeffersonville R. Co. v. Worland*, 50 Ind. 339; *Lake Shore, etc., R. Co. v. Bennett*, 89 Ind. 457, 471; *Hall v. Pennsylvania R. Co.*, 90 Ind. 459; *Snow v. Indiana, etc., R. Co.*, 109 Ind. 422, 426, 9 N. E. 702; *Pennsylvania R. Co. v. Walker*, 29 Ind. App. 285, 64 N. E. 473; *Parrill v. Cleveland, etc., R. Co.*, 23 Ind. App. 638, 55 N. E. 1026; *Stewart v. Cleveland, etc., R. Co.*, 21 Ind. App. 218, 226, 52 N. E. 89; *Indianapolis, etc., R. Co. v. Forsythe*, 4 Ind. App. 326, 29 N. E. 1138; *Baltimore R. Co. v. Ragsdale*, 14 Ind. App. 406, 42 N. E. 1106; *Sanders v. Hartage*, 17 Ind. App. 243, 46 N. E. 604. This was only an application of the rule that, where an oral or implied contract is declared upon, no recovery can be had upon a written contract, and, where a written contract is sued upon, no recovery can be had upon an oral or implied contract. *Paris v. Strong*, 51 Ind. 339; *Jeffersonville, etc., R. Co. v. Worland*, 50 Ind. 339; *Sanders v. Hartage*, 17 Ind. App. 243, 250, 252, 46 N. E. 604, and cases cited; *Pennsylvania R. Co. v. Walker*, 29 Ind. App. 285, 64 N. E. 473; 4 Ency. Pldg. & Prac. 922-927. It was uniformly held however that such defense was provable under the general denial. *Indianapolis, etc., R. Co. v. Remmy*, *supra*; *Baltimore, etc., R. Co. v. Ragsdale*, 14 Ind. App. 411, 42 N. E. 1106; *Crum v. Yundt*, 12 Ind. App. 308, 40 N. E. 79; *Sanders v. Hartage*, 17 Ind. App. 251, 46 N. E. 604. The error, if any, in sustaining a demurrer to a pleading, is harmless, if no more evidence is required to establish the cause of action or defense alleged under a paragraph left in the record than would have been required under the paragraphs held bad. *Field v. Noblett*, 154 Ind. 357, 361, 56 N. E. 841; *Hormann v. Hartmetz*, 128 Ind. 353, 354, 27 N. E. 731. As the same defenses could be made and evidence given under the general denial, which was left in the record as under the paragraphs held bad, the error, if any, in sustaining said demurrer, was harmless.

The law charges the common carrier with the duty of carrying all goods of the kind he professes to carry under the common-law

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liability, which makes him a practical insurer of the safety thereof while in his custody. The owner may rightfully demand that such property shall be received and carried under the carrier's common-law liability, and a contract limiting such liability, to which he is obliged to assent in order to secure transportation, cannot be considered as having been freely and fairly entered into, and will be of no effect in relieving the carrier from his common-law liability. It is not necessary to conclude the owner by the terms of a special contract limiting the liability of the carrier that he should actually have been offered the option of shipping subject to the terms of such contract or under the carrier's common-law liability. It will be sufficient if it would have been given if the owner had demanded it; but, if such demand would have been unavailing, the owner would be under no duty to make it, and his assent to a contract restricting the common-law liability. It is not necessary to conclude the owner terms. 1 Hutchinson on Carriers (3d Ed.) § 404; Lake Erie, etc., R. Co. v. Holland, 162 Ind. 407, 69 N. E. 138, 63 L. R. A. 948; Louisville, etc., R. Co. v. Gilbert, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162; Railway Co. v. Cravens, 57 Ark. 112, 20 S. W. 803, 18 L. R. A. 527, 38 Am. St. Rep. 230; Chicago & N. W. Ry. Co. v. Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep., note, pages 77-79, 93-95.

It appears from the special finding: That the said car load of sheep was shipped from Danville, Ind., on June 3, 1906; that at the time a contract was prepared by appellant's agent on one of the forms furnished by it, which limited its liability in the shipment of live stock; that the same was signed on behalf of appellee and by the agent of appellant; that said form of contract was the only form of contract then in use at said station for the shipment of live stock; that no agent of appellant had any authority to make on appellant's behalf any contract for the shipment of said sheep at the risk of appellant on the payment of a higher rate than that named in said contract or on any other consideration, or to make any contract therefor except the one signed by the parties, and no opportunity was given appellee to make any contract for the shipment of said sheep, except the one executed. It is evident from said finding that any demand of appellee that appellant carry said sheep under the common-law liability would have been unavailing, because there was no one authorized to make such a contract on behalf of appellant, and therefore, under the authorities above cited, his assent to the contract limiting the common-law liability of appellant did not bind him. In such case, under the authorities above cited, appellee had the right to disregard the contract limiting the liability of appellant, because he was not bound thereby and had the right to sue for the breach of the common-law duty. Lake Erie, etc., R. Co. v. Holland, *supra*. This was the rule before

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the taking effect of said act of 1905 (Acts 1905, p. 58, c. 47, being sections 3918-3920, Burns' Ann. St. 1908). Even if said act of 1905 (sections 3918-3920), *supra*, is unconstitutional, as claimed by appellant, the conclusion of law stated in favor of appellee upon the facts found was not erroneous. It is settled law that this court will not pass upon the constitutional validity of a statute when it can properly rest its decision upon other grounds. *White v. Sun Pub. Co.*, 164 Ind. 426, 430, 73 N. E. 890, and cases cited.

As the special finding shows that appellee was not bound by the contract limiting the common-law liability of appellant, it was liable for a breach of its common-law duty. The court did not err therefore in its conclusion of law.

Judgment affirmed.

JOLLIFFE v. NORTHERN PAC. R. CO.

(Supreme Court of Washington, April 5, 1909.)

[100 Pac. Rep. 977.]

Carriers—Carriage of Goods—Limitation of Liability—Negligence.*
—A carrier may not contract for relief against its own negligence.

Carriers—Carriage of Live Stock—Limitation of Liability—Delay—Burden of Proof.†—Where horses were shipped under a written contract, whereby the shipper assumed all risk of damages from delay, the burden was on the railroad of proving that delay was not due to its own negligence.

Evidence—Burden of Proof—Facts within Knowledge of Adverse Party.†—Where it is necessary to make a character of proof which, under the circumstances, is exclusively within the knowledge of one or the other of the parties, the burden of proof is on the party possessing such knowledge.

Carriers—Carriage of Live Stock—Delay in Transportation—Damages—Question for Jury.—In an action against a railroad for delay in transporting plaintiff's horses, evidence held sufficient to go to the jury on the amount of damages.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by N. T. Jolliffe against the Northern Pacific Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed, and new trial granted.

*See first foot-note appended to *Southern Express Co. (Ala.)*, 30 R. R. R. 271, 53 Am. & Eng. R. Cas., N. S., 271.

†See extensive note, 26 R. R. R. 298, 49 Am. & Eng. R. Cas., N. S., 298.

*Jolliffe v. Northern Pac. R. Co**Sayre & Sutherland*, for appellant.*Carroll B. Graves*, for respondent.

DUNBAR, J. On September 27, 1907, the plaintiff shipped a car load of horses at Grafton, N. D., to be transported over the lines of the Northern Pacific Railway Company to Seattle, Wash. The shipment reached its destination on October 13th, having been en route about 16 days. This action is for damages for injury to the horses, most of the damages being alleged to have been caused by the delay of the cars; it being conclusively shown that the cars were unduly delayed. It is not necessary to mention specifically the particular delays charged. The shipment was under a written contract, and it is the contention of the plaintiff that the delays, being unreasonable, were due to negligence of the defendant; that the horses shrunk an unusual amount by reason of these delays, thereby depreciating in value, and necessitating their being cared for from one to three months before they were fit to sell. At the close of plaintiff's case the court granted defendant's motion for a nonsuit, and thereafter overruled plaintiff's motion for a new trial. Judgment was entered, and appeal followed.

In the trial of the cause the appellant sought to testify as to the cause of the delay, and what he was informed by the trainmen was the cause of said delay. This was objected to, and the appellant was only allowed to testify to what he knew of his own knowledge. This is assigned as one of the errors in the case. The main contention in this case is founded on the following statement in respondent's brief, viz., that a carrier is only bound to use ordinary care and diligence to avoid unreasonable delay, and the fact that there is an unusual delay does not, of itself, show a breach of duty in showing whether or not there was a negligent delay. The respondent says: "While it is not contended that a carrier can contract against its own negligence, yet such stipulations as these, in a contract of this character, are upheld, except where the attempt is made to contract against negligence; and, in order for the shipper to avoid the effect of such a stipulation, the burden is upon him to prove that the act complained of is the negligent act of the carrier. In this case, and under this stipulation, it is not sufficient to show the mere fact of a delay, but the plaintiff must go further, and affirmatively show that such delays were caused by the negligence of the carrier. In the absence of a special contract limiting his liability the carrier must affirmatively show that the loss was occasioned by some cause for which he was not responsible; but, where there is a limited liability contract, and the loss falls within one of the excepted clauses, the burden of proof is upon the shipper to show negligence. The presumption, in the absence of proof to establish negligence, will be that the carrier has done his duty." This was the theory accepted by the court, and the

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theory upon which the cause was tried. The stipulation referred to in the contract is to the effect that the shipper assumes all the risk of damage he may sustain by reason of any delay in such transportation. Some cases are cited by the respondent which sustains this contention; but they are not founded on reason or justice, and we are therefore not inclined to follow them. It will be seen from this contract that this is, in effect, if construed as it has been construed by the respondent, a contract relieving the shipper from its own acts of negligence, thereby running directly counter to the first clause in the contract, which reads as follows: "The company shall not be liable for the loss or death of or injury to the stock unless the same is caused by the negligence of the company, its agents or employees." So that it will be seen that this contract recognizes the general principle that the carrier has no right to relieve itself by contract against acts of negligence on its part. The reason we say that the provision relied upon by the appellant is, in effect, a provision where an attempt is made to contract against negligence is that there would be no way, if this provision were literally construed, by which the shipper could show negligence, because he has made himself actually responsible for all damages which may be sustained by reason of any delay in the transportation. In this case appellant was asked if he knew the cause of the delay, and, when he undertook to state what the trainmen told him, was prevented from so stating; and, if this was a correct holding—a question upon which we do not pass—it shows the absolute injustice of the rule. For how can a man who has no knowledge of railroading, no way of ascertaining the manner in which the business is conducted by the company, or of compelling the confidence of the management tell the cause of the delay? It is true that in this instance the shipper accompanied the horses, but railroad companies do not usually establish their bureaus of information either in a horse car or a caboose, the only apartments in the train which were available to the shipper. A car may be side-tracked and delayed for 1 hour or for 24 hours by order of the train dispatcher, or some one in authority, hundreds of miles away, for a necessity which is apparent to him, and that necessity may have been brought about by negligence in the intricate management of the business by some responsible agent of the company a long distance from the location of the train which is side-tracked. There certainly can be no semblance of justice in relieving the party from making a disclosure who is in a position to make it, or in making an explanation which will excuse it if there be such an explanation available to him.

This court and other courts have frequently said that, where it is necessary to make a character of proof which, by reason of the circumstances surrounding the case, is exclusively within

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the knowledge of one or the other of the parties, the burden would be upon the party possessed of that knowledge to make the proof, and that is exactly the case here. This rule, which it is admitted by the respondent applies under the ordinary contracts, was no doubt based upon the reasons which we have just assigned. The reason for the rule has not in the least been changed by the modification in the contract, for the cause of the delay is just as difficult to prove, and just as much without the knowledge of the shipper and within the knowledge of the carrier, as it was under the regular contract. The fact that risks are assumed by the shipper which were not assumed under some other contract can in no way affect the rule or the reason for it. The court was also of the opinion that the proof of damages was not sufficiently definite to, enable the jury to determine the amount thereof. But while the proof of damages in many respects was somewhat cloudy, there certainly was testimony to the effect that by this unusual delay an unusual amount of shrinkage of all the horses would occur, and that they would have to be kept a longer time before they could be sold, and the testimony was definite and certain that all the horses had to be fed and cared for this extra length of time, and that it actually cost the respondent at the rate of \$15 a month for such extra care and keep.

The judgment will be reversed, and a new trial granted.

RUDKIN, C. J., and FULLERTON, CROW, MOUNT, and GOSE, JJ., concur. PARKER and MORRIS, JJ., not sitting. CHADWICK, J., concurs in the result.

LOUISVILLE & N. R. CO. v. STILES, GADDIE & STILES.

(Court of Appeals of Kentucky, May 12, 1909.)

[119 S. W. Rep. 783.]

Carriers—Carriage of Live Stock.—Where cattle being transported by a carrier were unloaded for food, etc., in compliance with the federal statute, and while in the stockyards were burned in a conflagration which was not caused by any negligence of the carrier, it was liable for the loss.

Carriers—Carriage of Live Stock—Food and Rest.—At common law it was the duty of carriers of live stock for long distances to feed, water, and rest them as reasonable necessity required.

Carriers—Carriage of Live Stock—Liability as Carrier.*—When live stock is delivered to a carrier for transportation, its liability com-

*See second head-note of *Stapleton v. Grand Trunk Ry. Co.* (Mich.), 9 R. R. R. 332, 32 Am. & Eng. R. Cas., N. S., 332, where all the authorities on the subject, preceding it, are collected; first head-note of *Nelson v. Chicago, etc., Ry. Co.* (Neb.), 23 R. R. R. 613, 46 Am. & Eng. R. Cas., N. S., 613; third head-note of *Lackland v. Chicago & A. Ry. Co.* (Mo. App.), 11 R. R. R. 414, 34 Am. & Eng. R. Cas., N. S., 414.

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mences when the stock is delivered to it at its stock pens or warehouses for shipment.

Carriers—Carriage of Live Stock—Liability as Warehousemen.†—Where a carrier of live stock has notified the consignee of the arrival of the shipment and a reasonable time for him to receive it has elapsed, the liability of the carrier becomes that of a warehouseman.

Appeal and Error—Evidence Admissible by Reason of Evidence of Adverse Party.—Appellant could not complain of incompetent testimony brought out on the redirect examination of a witness to explain incompetent testimony developed on cross-examination by appellant.

Appeal and Error—Harmless Error—Admission of Evidence.—Error in the admission of incompetent evidence was cured by the practical elimination of it by the instruction.

Appeal from Circuit Court; Nelson County.

"To be officially reported."

Action by Stiles, Gaddie & Stiles against the Louisville & Nashville Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

John S. Kelly, R. C. Cherry, and Benjamin D. Warfield, for appellant.

Geo. S. & J. A. Fulton, for appellees.

BARKER, J. This is the second appeal of this case. The opinion on the first is to be found in 110 S. W. 820. The first appeal was taken by the plaintiffs to review the judgment of the trial court in sustaining a general demurrer to their petition and dismissing it upon their declining to amend. In the opinion on that appeal we held that a common carrier was liable for the safety of live stock committed to its care for transportation, unless lost or destroyed by the act of God or the public enemy, or where the loss or destruction was the result of the inherent propensity or vice of the animals. Upon the return of the case for further procedure in conformity to the opinion, the defendant (appellant) answered, denying the value of the horses destroyed by fire as alleged in the petition, and pleading affirmatively that the horses destroyed were being transported by it as interstate commerce from East St. Louis, Ill., to New Haven, Ky.; that, when the animals arrived at Louisville, Ky., under the provisions of the federal statute requiring animals shipped by common carriers to be unloaded, fed, and watered at stated intervals, the horses were

†See foot-note of *Fisher v. Northern Pac. Ry. Co.* (Wash.), 28 R. R. 763, 51 Am. & Eng. R. Cas., N. S., 763; first foot-note of *Poythress v. Durham & S. Ry. Co.* (N. Car.), 31 R. R. 76, 54 Am. & Eng. R. Cas., N. S., 76; fifth head-note of *Wall-Huske Co. v. Southern Ry. Co.* (N. Car.), 30 R. R. 318, 53 Am. & Eng. R. Cas., N. S., 318; foot-note of *North Yakima, etc., Co. v. Northern Pac. Ry. Co.* (Wash.), 29 R. R. 689, 52 Am. & Eng. R. Cas., N. S., 689.

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unloaded and placed in the Bourbon stockyards, to be fed, watered, and rested, and while in the stockyards they were burned by a conflagration which totally destroyed the stockyards; that this conflagration was without any negligence on the part of the carrier; and that, therefore, it was not liable for the loss occurring in the manner stated. A general demurrer to the second paragraph of the answer was sustained, and a trial upon the issue raised by the first paragraph, which is merely a denial of the value of the animals destroyed, resulted in a verdict in favor of the plaintiffs (appellees) for the sum of \$2,180. From the judgment based upon this verdict the carrier prosecutes this appeal.

The first question which we propose to discuss is the merit of the second paragraph of the answer of appellant. It is conceded that the horses in question had been shipped by the appellees from Mountain Home, in Idaho, to New Haven, Ky., and that the appellant received them at East St. Louis, Ill., and was transporting them to their place of consignment, New Haven, Ky., when they were destroyed by fire in the Bourbon stockyards. It is not denied that the carrier had unloaded the stock at Louisville and placed them in the stockyards for the purpose of feeding, watering, and resting them in pursuance of the requirements of the federal statute regulating the shipment of live stock as interstate commerce. Nor is it denied that the animals were destroyed while in the Bourbon stockyards by a general conflagration which was in no wise caused by the negligence of the carrier, or, so far as this record shows, by the negligence of any one. The question, then, arises: Did the unloading of the animals and the placing of them in the stockyards in pursuance of the statute relieve the carrier from its common-law liability settled definitely as to it by the opinion rendered on the first appeal of this case? We think this question must be answered in the negative. Certainly there is nothing in the statute which indicates an intention on the part of Congress to change the rule as to the liability of carriers of live stock. The statute is a wise and humane enactment for the benefit of live stock being shipped as interstate commerce. It in no wise changes the common-law duty of the carrier with reference to live stock except to make definite and certain how and when such stock shall be fed, watered, and rested. Undoubtedly at common law it was the duty of carrier of live stock for long distances to feed, water, and rest as a reasonable necessity required. Practically the statute only makes certain when and where the common-law duty of the carrier for the preservation and comfort of the stock should be exercised. The mere fact that the stock is unloaded and placed in pens for the purpose of being rested, watered, and fed does not change the liability of the carrier. The stock was still en route. It had not yet reached its destination. The care and responsibility of the carrier does not end until the stock reaches its

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destination and notice of its arrival is given to the consignee. This is not pretended in the case at bar. Here the stock was in the pen of the carrier. After it had been fed, watered, and rested, as required by the statute, it was to be again loaded upon the cars and carried forward to its destination. It was still freight being transported.

On the subject of the common-law duty of the carrier of live stock, it is said in 5 Am. & Eng. Encyc. of Law (2d Ed.) p. 436: "In the absence of special provisions in the contract of shipment, the carrier is bound to feed and water live stock being transported by it at proper intervals along the route, and it will be liable for a loss or injury occurring to the stock on account of its failure to do so. If it is necessary to unload them in order to feed and water them, the carrier must do so, and must have suitable and safe facilities therefor." To the same effect is 2 Hutchinson on Carriers (3d Ed.) § 634; 4 Elliott on Railroads (2d Ed.) § 1553; Moore on Carriers, p. 504. The rule is that when live stock is delivered to a railroad corporation for transportation, its liability commences when the stock is delivered to it at its stock pens or warehouses for shipment, and continues until the journey is ended, the consignee notified, and a reasonable time given him to receive it. After that time, if the consignee fails to receive and care for the stock, then the carrier may place it in pens or warehouses, and the completion of its liability is changed from that of carrier to that of warehouseman; its liability for loss as warehouseman depending upon its due care or negligence. On this subject, 1 Hutchinson on Carriers (3d Ed.) § 141, says: "At each successive point of transfer from one carrier to another they are liable to be placed in warehouses, there perhaps to be delayed by the accumulation of freight or other causes and exposed to loss by fire or theft without fault on the part of the carrier or his agent. Superadded to these risks are the dangers of loss by collusion, quite as imminent while the goods are thus stored at some point unknown to the owner as while they are in actual transit. As a general rule, the storing of the goods under such circumstances should be held to be a mere accessory to the transportation, and they should be under the protection of the rule which makes the carrier liable as an insurer from the time the owner transfers their possession to the first carrier until they are delivered to him at the end of the route. But, when they have reached their destination, nothing more generally remains to be done by the carrier after storing them and giving notice of their arrival to the consignee, and after allowing a reasonable time for their removal he becomes a mere warehouseman; and, if after that they are destroyed without his carelessness, the loss must be borne, as in equity it should be, by the owner." We have been cited to no authority by appellant in support of its position that

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the temporary unloading and placing of the stock in a warehouse or stock pen for the purpose of resting, feeding, and watering it will have the effect to change the liability of a carrier from that of insurer to that of warehouseman; and we feel constrained, in the absence of such authority, to hold that such unloading is a mere accessory to the transportation, and while thus temporarily unloaded the stock should be under the protection of the rule which makes the carrier liable as an insurer from the time the owner transfers his possession to the carrier until the stock is delivered to him at the end of the route.

The appellant as another ground for reversal insists that the court erred in admitting testimony as to the cost of the horses in Idaho and the expense of the plaintiffs in purchasing them. We would be inclined to agree with appellant that this evidence was not only incompetent, but prejudicial to its interest; but, unfortunately for its position, the greater part of the evidence it complains of as incompetent was brought out on the redirect examination of the plaintiffs in response to, or to make plainer the evidence that had been developed on the cross-examination by counsel for appellant. The plaintiffs were asked on cross-examination what they paid for the horses in Idaho, and what their expenses amounted to, what they paid at hotels, their buggy hire, etc.; and we think, therefore, that appellant has no right to complain that on the redirect examination plaintiffs' counsel made more specific the testimony which was really commenced in the cross-examination. Perhaps there were one or two questions and answers that, strictly speaking, might not come under this rule; but we do not think, taking these alone, that the interests of the defendant were prejudiced, especially in view of the fact that the court practically eliminated it all by the instructions given to the jury limiting the damages sustained by the plaintiffs to the reasonable value of the horses which were burned at the place of consignment, New Haven, Ky.

Upon the whole case, we are of opinion that the appellant received a fair trial at the hands of the court, and that there were no errors committed adversely to its interests, or of which it has a right to complain.

Judgment affirmed.

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(Supreme Court of Oklahoma, May 12, 1909.)

[102 Pac. Rep. 104.]

Carriers—Carriage of Live Stock—Exemption from Liability.*—

The carriage of live stock involves different requirements than those involved in the carriage of inanimate objects. In view of this, it is well settled that the owner and the carrier may, by contract, provide that the carrier shall be exempt from all liability for injuries occurring to the stock disconnected and apart from the conduct and running of the trains, such as injury from loading and unloading, from overloading, suffocation, heating, and the like, or from the weakness, escape, or viciousness of the stock.

Carriers—Carriage of Live Stock—Limitation of Liability.—Such a contract, however, does not relieve the carrier from the due performance of its undertaking. It must use at least ordinary care and diligence in the performance of all its duties, and while its obligations may be limited by special contract yet it cannot be exonerated by any agreement made in anticipation thereof from liability for the gross negligence of itself or its servants.

Negligence—Questions for Jury—Negligence—Contributory Negligence.—Negligence and contributory negligence are usually questions for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court.

Negligence—Questions for Jury—Contributory Negligence.—Where from the facts shown by the evidence, although undisputed, reasonable men might draw different conclusions respecting the question of negligence or contributory negligence, such questions are properly for the jury.

Carriers—Carriage of Live Stock—Written Request to Unload—Waiver.—Where a contract for the carriage of live stock provides that the carrier shall stop its train at any of its stations for water and feed where it has facilities for so doing, whenever requested in writing by the owner of said live stock or the attendant in charge thereof, the refusal of the agents of the carrier to unload such live stock on the oral request of the owner, basing such refusal upon the ground that the freight thereon had not been paid, waived a strict compliance with the clause of the contract requiring the request to be made in writing.

*For the authorities in this series on the question whether a carrier of live stock can limit its liability, see second foot-note of *Central of Georgia Ry. Co. v. Glascock & Warfield* (Ga.), 9 R. R. R. 292, 32 Am. & Eng. R. Cas., N. S., 292, where all those preceding it are collected, second foot-note of *Houtz v. Union Pac. R. Co.* (Utah), 28 R. R. R. 663, 51 Am. & Eng. R. Cas., N. S., 663.

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Carriers—Carriage of Live Stock—Rules Indorsed on Contract.†—The printed rules and regulations indorsed on the back of a contract for the transportation of live stock, under the head of "Special Notice to Agents," is no part of the contract, and is not binding upon the shipper, in the absence of some evidence of his assent to the terms of such notice.

Carriers—Carriage of Live Stock—Notice of Injury—Time of Service.‡—A provision in a contract for the carriage of live stock which provides "that, as a condition precedent to a recovery for any damages for delay, loss or injury to live stock covered by this contract, the second party will give notice in writing of the claim therefor to some general officer or the nearest station agent of the first party, or to the agent at destination, or some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of such stock at destination," does not apply when at the time said live stock was unloaded and removed by the owner he did not know of the injury done said live stock, if said injuries were such as could not be ascertained within the time limited by the contract by the exercise of ordinary care.

(Syllabus by the Court.)

Error from District Court, Washita County; M. C. Garber, Judge.

Action by S. H. Copeland against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Flynn & Ames, for plaintiff in error.

T. A. Edwards, for defendant in error.

KANE, C. J. This was an action for damages to certain live stock, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, in the district court of Washita county. The petition alleges, in substance, that on the 10th day of August, 1904, for a valuable consideration, and according to a contract between the parties, partly in

†See extensive note appended to *McGregor v. Oregon R. Co.* (Ore.), 28 R. R. R. 374, 51 Am. & Eng. R. Cas., N. S., 374; second head-note of *Cleveland, etc., Ry. Co. v. Louisville Tin & Stove Co.* (Ky.), 30 R. R. R. 672, 53 Am. & Eng. R. Cas., N. S., 672; *Harris v. Great Northern Ry. Co.* (Wash.), 30 R. R. R. 265, 53 Am. & Eng. R. Cas., N. S., 265.

‡See extensive note appended to *Liquid Carbonic Co. v. Norfolk & W. Ry. Co.* (Va.), 27 R. R. R. 383, 50 Am. & Eng. R. Cas., N. S., 383; fifth head-note of *Jones-Lane Co. v. Atlantic Coast Line R. Co.* (N. Car.), 31 R. R. R. 46, 54 Am. & Eng. R. Cas., N. S., 46; last foot-note of *Missouri & N. A. R. Co. v. Snead* (Ark.), 29 R. R. R. 652, 52 Am. & Eng. R. Cas., N. S., 652.

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writing and partly oral, the plaintiff delivered to the defendant certain live stock to be shipped from the town of Eddy, Okl., to the town of Cordell, Okl.; that said live stock consisted of 4 head of horses and 15 head of cattle, constituting one car load; that it was loaded on the 10th day of August, 1904, at 3 o'clock p. m., and by proper and careful handling should have been delivered at Cordell not later than 6 o'clock a. m. on August 11, 1904, the distance between Eddy and Cordell being about 135 miles; that the defendant did not convey said car with reasonable dispatch, but so negligently and carelessly managed said train that the same was delayed at the town of Enid for a period of 10 hours, and did not reach Cordell until 4 o'clock a. m. on the 12th day of August, 1904; that the plaintiff accompanied said car of live stock as caretaker, and that during all the period said live stock was in the possession of defendant he was not supplied with any facilities for feeding, watering, and unloading the same, except at the town of Enid, where such facilities were provided and the live stock watered; that when said car reached Cordell the plaintiff requested the conductor in charge of said train to set said car on the side track where the same could be unloaded, and the request was refused, and the plaintiff demanded facilities for feeding and watering said stock, which demand was refused by the railway company's agent, and said car was held on the tracks of defendant until 10 o'clock a. m. of the 12th day of August, 1904, when it was set and the live stock unloaded; that during all this time the weather was oppressively hot; that as soon as said car was set out the live stock was unloaded; that at that time it was not apparent that said live stock was injured other than that they were greatly gaunted, and suffered on account of the long confinement, heat, and lack of feed and water, but that plaintiff did not, and could not, ascertain that the live stock had been overheated during the confinement in said car, and for that reason he was unable to notify defendant of any damages done said live stock while in said car; that upon unloading said cattle from said car the plaintiff gave them prompt and careful attention and care; that on or about the 14th day of August, 1904, it developed that the cattle shipped in said car had, on account of the negligence and carelessness of the defendant, and its unwarranted delay in transporting said cattle, and by its failure to provide facilities for feeding, watering, and unloading said cattle during said transportation, and in not setting out said car to be unloaded after it arrived, said cattle had become overheated, and from the effects thereof six cows and one bull died. It was further alleged that, as soon as the injury done said cattle by reason of said overheating could be ascertained, said plaintiff gave notice thereof to the agent of the railway company, and subsequently filed a written claim for damages, which was rejected; that said live stock were of the value of \$695, for which plaintiff prayed judgment.

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The defendant by way of answer set up, first, a general denial; second, an admission that the shipment referred to was received and carried according to the terms of the written contract referred to in plaintiff's petition, but denied that any oral agreement or understanding in addition to said written contract was made by or in its behalf, and further alleged that by the terms of said written contract it was specifically provided that no agent of the defendant had authority to make any other agreement in addition to that contained in said written contract. That the plaintiff in error in all respects complied with said written contract, and transported said live stock with reasonable diligence and due care, and that the injuries sustained by said cattle were due to, and caused by, the negligence of the plaintiff or his agents. That by the terms of said written contract the plaintiff agreed (1) to unload, feed, water, and care for said live stock while in transit; (2) to release the defendant from any loss sustained in consequence of any delay, except the amount, if anything, actually expended by him in the price of feed and water for said live stock; (3) that the defendant should not be held liable for any damage to said live stock and cattle through heat or suffocation, whether caused by overloading in said car or not; (4) that said live stock were not to be transported within any specified time, nor delivered at any particular hour; (5) that the defendant should stop its car at any of its stations for water and feed where it had facilities for so doing whenever requested in writing so to do by the owner of said live stock or the attendant in charge thereof; (6) that plaintiff should not confine said live stock in the car for a longer period than 28 consecutive hours without rest for feed and water for at least 5 consecutive hours. That plaintiff did not request the defendant in writing to unload said live stock for feed, rest, and water as provided in said contract. That said live stock were unloaded, fed, and watered at Enid, and that said live stock were not confined in said car for a period to exceed 28 hours as provided in said contract. That plaintiff by said contract, in consideration of the reduced freight rate at which said live stock were carried, agreed to, and did, release plaintiff in error from any and all liability for or on account of delay in the shipping of said live stock after delivery thereof to plaintiff in error, and from any delay in receiving the same after tender of delivery, and said plaintiff by said written contract waived any and all damages that had theretofore been incurred by any written or verbal contract prior to the execution of the contract attached to his petition. The defendant further alleged, in substance, that by the terms of said contract, in consideration of the reduced freight rate by which the same were transported, it was specifically agreed that, in case of damage to said live stock, the same was to be in value not to exceed \$50 for each bull, and \$30 for each cow included in said shipment, and by the terms

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of said contract plaintiff was estopped to claim damages for loss for any of said cattle in excess of said amount. That it is specifically provided in paragraph 11 of said written contract that as a condition precedent to the recovery of any damage for delay, loss, or sickness to said live stock, the plaintiff must give notice in writing of the claim thereof to some general officer or the nearest station agent of the defendant, or to the agent at destination, and before said live stock is mixed with other live stock; that no such notice was given, or attempted to be given, by plaintiff, and that they had no knowledge of any damage to said live stock, or that any claim would be made. For reply the plaintiff filed a general denial. Upon the issues thus joined the cause was tried before a jury, which returned a verdict in favor of plaintiff in the sum of \$645, upon which judgment was duly entered. At the time of filing the general verdict the jury also returned certain answers to special interrogatories, which will be further noticed hereafter. A motion for a new trial was overruled, and the defendant brought the case to this court by petition in error.

Counsel for plaintiff in error assign various grounds of error, but confine their argument to four, and two of these they argue together. The assignments presented by their brief are as follows: First, the trial court erred in overruling defendant's motion for judgment on the special findings, notwithstanding the general verdict; second, the trial court erred in overruling and refusing defendant's motion requesting a peremptory instruction directing the verdict for the defendant; third, the trial court erred in permitting the jury to return a verdict for an amount greater than that shown by the valuation clause noted on the contract between the parties; fourth, there was nothing in the case in the trial court to exempt the defendant in error from complying with the eleventh paragraph of the contract of shipment. On the first proposition counsel contend that the carriage of animals evidently involves different requirements than those involved in the carriage of inanimate objects. They must be loaded and unloaded with more care; they must be fed, watered, and protected; they must be secured from escape; they must be guarded against heating, crowding, and suffocation; they must often require skilled attention and assistance. For these and like reasons the owner and the carrier may both desire that the owner, or some experienced person in his behalf, shall accompany the stock and assume its care, leaving to the carrier only the duty of transportation with its necessary incidents. In view of these facts it is well settled that the owner and the carrier may, by contract provide that the carrier shall be exempt from all liability for injuries occurring to the stock disconnected and apart from the conduct and running of the trains, such as injury from loading and unloading, from overloading, suffocation, heating, and the

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like, or from the weakness, escape, or viciousness of the stock. Such a contract does not relieve the carrier from the due performance of his undertaking; nor can he, according to the weight of authority, by such a contract escape responsibility for the negligence of himself or his servants. The consideration for such contracts is usually found in the reduced rates given and the free transportation of the shipper or his agent to and from the destination of the stock. Hutchinson on Carriers (3d Ed.) § 419.

Counsel for defendant in error concedes that the foregoing excerpt from Mr. Hutchinson's work on Carriers states the rule correctly, but contends that such a contract does not relieve the carrier from the due performance of his undertaking, nor can he escape responsibility for the negligence of himself or his servants. That the Legislature of Oklahoma recognizes the vicious effect of this class of contracts permitting common carriers to contract in such a manner as to relieve them from their ordinary liability as common carriers is shown by its enacting and making a part of the statute law of the state a provision which, under certain circumstances, makes such contracts null and void. The section of the statute referred to is section 706, Wilson's Rev. & Ann. St. 1903, which reads as follows: "A carrier cannot be exonerated by any agreement made in anticipating thereof, from liability for the gross negligence, fraud or willful wrong, of himself or his servants." He argues that under this theory of the case there are only two questions for the court to answer: (1) Does the evidence show such gross negligence and disregard of duty on the part of the plaintiff in error of its servants as to have warranted the trial court in submitting the case to the jury? (2) Is defendant in error precluded by the contract from recovery, on account of negligence on his part, through failure to have literally complied with all the provisions of the contract as to the giving of notice, making demand for the feeding, watering, and unloading of the cattle, the payment of freight, and the filing of his claim for damages? It was upon the theory above outlined that the case was tried below, the court also submitting to the jury an instruction in relation to the notice clause of the contract which will be adverted to hereafter.

The instruction of the court upon the first proposition was as follows: "You are instructed that a carrier of property for reward must use at least ordinary care and diligence in the performance of all its duties, and while its obligations may be limited by special contract, yet it cannot be exonerated by any agreement made in anticipation thereof from liability for the gross negligence of itself or its servants; and, if you find from the evidence that the injury to the cattle of plaintiff, Copeland, was caused by the gross negligence of the servants or employees of defendant, you should, notwithstanding the special contract, find

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for the plaintiff, unless you should also find that the injury to said cattle was contributed to by the negligence of plaintiff, Copeland, or his agents." This instruction, to our mind, states the law correctly, and if there is any evidence in the record reasonably tending to establish gross negligence on the part of the carrier, the verdict of the jury on that point is conclusive in this court. Negligence and contributory negligence are usually questions for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of the law for the court. The answers of the jury to certain special interrogatories disclose: That the cattle were loaded at Eddy on the 10th day of August, 1904, and were unloaded at Cordell at 10 o'clock a. m. on the 12th day of August, 1904; that two days after they were removed from the car, one bull, valued at \$250, three cows, valued at \$75 each, and three cows valued at \$50 each died from overheating; that the cattle were in charge of S. H. Copeland and one Hammett during transit; that the plaintiff did not notify the defendant of any damage before removing the cattle from its possession; that the owner of the cattle tendered the agent of the railway company at Eddy the money to prepay the freight thereon, and that the agent refused to accept such payment; that the car containing the cattle was delayed at Enid about 10 hours; that the plaintiff requested the railway company to set out the car at Enid so that the cattle might be unloaded, but that the agent of the railway company refused to do so, upon the ground that he was going to send it forward at once; that said car did not go forward on the next train south for Cordell, but remained at Enid for something like 10 hours; that the first train out of Enid before this live stock went forward did not go to Cordell, but stopped at Bessie, seven miles north of Cordell, where there were facilities for unloading cattle; that the car containing these cattle did not arrive at Cordell until about 4 o'clock the next morning, and when it did reach there the railway company had no agent on duty to receive payment of freight, and the plaintiff orally requested the conductor to set the car out so that the stock might be unloaded immediately on arrival at Cordell, and the conductor refused to do so, giving as the reason of his refusal that the freight had not been paid; that the plaintiff offered to pay the freight to the conductor, but he would not receive it, saying that he had no authority to receive it, and had no orders to spot the car; that the cattle were confined in his car at Cordell until between 9 and 10 o'clock in the forenoon, a period of five or six hours after arrival, before the car was set out for the purpose of unloading. We think this evidence was sufficient to go to the jury on the question of gross negligence.

In *Wallace v. Lake Shore & Michigan Southern Railway Company*, 133 Mich. 633, 95 N. W. 750, it is held that: "There was

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also evidence that for at least two hours the car was left on a side track after a long journey, when it was possible to deliver the hogs promptly to a connecting road. Held sufficient to go to the jury on the question of defendant's negligence in the respects alleged." In *Ruppel v. Allegheny Valley Railway Company*, 167 Pa. 166, 31 Atl. 478; 46 Am. St. Rep. 666, the court, in discussing this proposition, says: "This written contract only expresses what the law implies on the part of the common carrier; namely, that goods which it accepts shall be transported with reasonable dispatch towards destination. Whether the contract has been kept is a question of fact. If there be contradictory evidence, or if the facts warrant opposite inferences, the case must go to the jury." It is not seriously contended by counsel for defendant that there was not sufficient evidence to warrant the jury in finding that the carrier was guilty of gross negligence, but it is insisted that by the terms of the contract it could not, in any event, be held liable for any damages or injury sustained by the live stock from heat or suffocation, whether caused by defendant's gross negligence or not. The cases cited by counsel, however, do not to our mind sustain this contention. In one of them (*Squire v. N. Y. C. R. R. Co.*, 98 Mass. 239, 93 Am. Dec. 162) Mr. Justice Gray, speaking for the court, says: "The law is now well settled that, in the absence of any statute upon the subject, common carriers may by special contract limit their liability, at least against all risks but their own negligence or misconduct." To the same effect is *Hutchinson on Carriers*, also quoted by counsel for defendant. By reference to section 419, *supra*, this language will be found: "Such a contract does not relieve the carrier from the due performance of his undertaking; nor can he, according to the weight of authority, by such contract escape responsibility for the negligence of himself or his servants." The above quotations from the opinion of Mr. Justice Gray and Mr. Hutchinson's work on Carriers negative the idea that the carrier by such a contract could absolve itself from the payment of damages occasioned by its gross negligence. We believe that the words, "from heat or suffocation whether caused by overloading the cars or otherwise," as used in the contract in the case at bar, did not exempt the carrier from responding in damages for injury to live stock from heat or suffocation, occasioned by its gross negligence or that of its servants, or employees. This construction is in harmony with the weight of authority, and also gives effect to section 706, *Wilson's Rev. & Ann. St. 1903*.

It is further urged by counsel for the plaintiff in error that another reason the motion for judgment on the special findings should have been sustained is found in the jury's answer to special interrogatory No. 12, submitted by the plaintiff in the court below. This finding was that plaintiff did not request

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defendant's agent, or any of them, in writing to feed or water said cattle while in transit. The evidence and special findings of the jury show that the stock was watered at Enid, and that between Enid and Cordell it was not unloaded or watered, and that the plaintiff did not request the carrier in writing to stop and unload for that purpose. This evidence was admissible as tending to show contributory negligence on the part of the plaintiff. The question of contributory negligence, however, was submitted to the jury under proper instructions, and we are not prepared to say that the foregoing facts although uncontradicted, constitute negligence *per se* which would warrant the court in taking the case from the jury. "Where from the facts shown by the evidence, although undisputed, reasonable men might draw different conclusions respecting the question of negligence or contributory negligence, such questions are properly for the jury." *Sans Bois Coal Co. v. Janeway*, 99 Pac. 153 (an Oklahoma case, not yet officially reported).

The evidence shows conclusively that the plaintiff did orally request the carrier to unload the stock immediately upon its arrival at Cordell, and that the conductor in charge of the train refused to do so, not for the reason that the request was not in writing, but for the reason that the freight had not been paid; that immediately after putting the car of stock upon the side track at Cordell the freight train that carried it there left on its way south, and after that there was no agent of the company present upon whom the plaintiff could make request in writing, or any other way, to have the stock unloaded and watered. The refusal of the agents of the railway company to unload the stock at Cordell, being based upon the fact that the freight had not been paid, waived the stipulation in the contract requiring the request to be made in writing. There is no doubt from the evidence that the request to unload would not have been complied with, even if it had been made in writing, as the conductor said he could not unload it because the freight had not been paid, and he had no authority to receive the money to pay the freight.

In *Wallace v. Lake Shore & Michigan Southern Railway Company*, *supra*, it appeared that the waybill contained a provision that no claim for damages should be made unless filed within five days, and verified by the affidavit of the shipper or his agent. The claim for damages was filed one day late. After examination and further correspondence, the railway company declined to make payment, but not upon the ground of the claim having been filed too late. The court held: "We think this constituted a waiver of the right to insist upon time." In *Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. Heath*, 22 Ind. App. 47, 53 N. E. 198, the rule is stated thus: "Where the general claim agent of a common carrier receives an unverified claim for damages to live stock, without objecting to

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such claim for lack of verification, and such agent states at the time that he will not consider the claim unless the original contract is produced, and certain proofs of loss furnished, the receipt of the claim and the statement of the agent amount to a waiver of the provision in the contract for shipment that any claim for damages thereunder must be verified." In *Soper v. Railroad Company*, 113 Mich. 443, 71 N. W. 853, the court says: "The only point open to discussion under the exceptions and assignments of error is whether the trial court erred in its disposition of the question of waiver. It is the claim of the defendant that, because of the conditions attached to the bill of lading, the plaintiff was bound to serve upon the defendant a verified statement of his claim within five days after the removal of the stock from the cars, and that, as he did not do this, he could not recover. The plaintiff claimed that this condition was waived by the letters, acts, and conduct of the defendant. * * * It will be noticed that Mr. Sanford does not seek to resist the claim upon the ground that a verified statement of the claim was not furnished in time, and there is nothing in the record to show that this defense was ever interposed until the time of the trial. * * * It is not at all certain, in view of the statements contained in these letters, that the trial judge would not have been justified in instructing the jury as a matter of law that the defendant had waived its right to insist upon a verified statement of the claim. * * * The question, however, was submitted to the jury, and we do not think there is any ground for complaint upon the part of the defendant."

There does not seem to be any evidence in the record to sustain the third assignment of error. The part of the contract whereby it is claimed that the carrier limited its liability appears in the record as follows: "To the St. Louis & San Francisco Railroad Company: The undersigned offers for shipment over your road 15 head of cattle, 4 horses, from Eddy to Cordell, each head of the estimated weight of _____ pounds, and valued at _____ dollars per _____ and _____ head of _____ from _____ to _____, each head of the estimated weight of _____ pounds, and valued at _____ dollars per _____ which valuation is named by me for the purpose of securing a reduced rate of freight on this shipment; and I agree that in case of loss or damage to same said valuation so named shall be conclusive, should I make any claim for such loss or damage against any carrier over whose line the same may pass. This application is an election on my part to avail myself of a reduced rate, by making this shipment under the following contract, limiting the liability of such carrier, instead of shipping the same at a higher rate without such limitation. Witness: _____ S. H. Copeland, Owner or Shipper." After the foregoing, and attached thereto, follows what is designated, "Original Live Stock Contract."

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The tenth paragraph of this contract reads as follows:

"It is further agreed that neither the company nor any carrier over whose lines this stock may be transported, shall be liable for any injury to said stock in any amount above the actual damages thereto, nor in any amount in excess of the value thereof as stated in the application of the shipper, which is hereto attached and made a part hereof, and in case of total loss of said stock or any portion thereof and claim therefor is made by the shipper against the company or any connecting line wherein the value of said stock may be material the valuation named in said application shall be conclusive upon all parties hereto." The "Original Live Stock Contract" is not signed by either of the parties.

The sixteenth paragraph thereof provides:

"The evidence that the party of the second part, after full consideration hereof, assents to all the conditions of the foregoing contract is his signature hereto."

There is an indorsement on the back of this contract, under the heading "Valuation Clause, Special Notice to Agents," as follows: "Ratings given herein are based upon declared valuations by shippers not exceeding the following: Each horse or pony (gelding, mare, or stallion), mule or jack, \$100.00; each ox or bull, \$50.00; each cow, \$30.00; each calf, \$10.00; each hog, \$10.00; each sheep or goat, \$3.00. Animals valued at more than as herein above specified will be received or transported only under other special contract. Agents will, in all instances, see that shipper's valuations are filled in blank space left for that purpose in application attached to the contract, and that such application, as well as the contract, is signed by the shipper or his authorized agent."

Two important directions to agents were evidently omitted in preparing the contract in this case: (1) The blank spaces left for shipper's valuations were not filled in; and (2) the "Original Live Stock Contract" was not signed by the shipper or his authorized agent. We believe these omissions were fatal to the right of the carrier to insist upon that part of the contract. It was specifically stated in the tenth paragraph of the contract that in case of loss the valuations named in said application shall be conclusive upon all parties. As there were no valuations named, it is difficult to determine by what process of reasoning the valuation clause may now be held binding. It cannot successfully be maintained that the indorsement on the back of the contract entitled "Special Notice to Agents," which fixes a maximum valuation on certain classes of live stock, is binding upon the shipper. This indorsement cannot be regarded even as notice to the shipper of the limitation as to value, and there is no evidence in the record showing that the same was brought to his attention, and that he assented and agreed thereto.

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In *Western Transportation Company v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760, it was contended in behalf of the transportation company that the qualifications and conditions appearing on the back of a receipt were a part of the contract, no matter on what part of the paper they were printed. In discussing this proposition Mr. Justice Breese, who delivered the opinion of the court, says: "The important question in this case is raised by the second point made by the defendants that the conditions and exceptions on the back of the bill of lading, being parts of the contract, must go to qualify and affect the liability of the defendants, and they, therefore, should have been noticed in the declaration; and the omission to do so constituted a fatal variance between the contract described in the declaration and the contract proved in evidence. The conditions and exceptions here spoken of are contained in a certain clause printed on the backs of the bill of lading or receipt for the powder, under the head of 'Conditions and Rules.' It is as follows: 'The companies will not hold themselves liable at all for injuries to any articles of freight during the course of transportation, occasioned by the weather, or accidental delays, or natural tendency to decay.' The objection made by the defendants to the omission of this clause from the declaration brings up the questions, Was it a part of the contract? Can a common carrier limit his common-law liability by a notice of this kind, even if brought home to the knowledge of the owner, or only by a special contract with the owner of the goods? We believe the rule to be now well settled that the common-law liability of a common carrier cannot be so restricted for, notwithstanding the notice, the owner has a right to insist that the carrier shall receive and carry the goods subject to all the incidents of his employment; and there can be no presumption, when they are delivered to and received by the carrier, that the owner intended to abandon any of his legal rights, or yield to the wishes of the carrier."

In *Railroad Company v. Hale*, 6 Mich. 243, a case in which the limitation of the liability of the company was indorsed on the back of the receipt or bill of lading, the court says: "Something more than mere notice indorsed upon a receipt, or otherwise brought to the consignor's knowledge, is necessary to relieve the carrier from his common-law liability. His assent to the limitation is still necessary; and this is a question of fact for the jury, to be determined by evidence *aliunde*, and is not the subject of presumption from the terms of the receipt alone." The third paragraph of the syllabus in the foregoing case reads as follows: "A common carrier cannot limit his common-law liability by a mere notice indorsed upon the receipt given the consignor, or otherwise brought to the consignor's notice. The assent of the letter to the limitation is necessary, and must be proved by evidence *aliunde*—it cannot be presumed from the terms of the

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receipt alone, or be implied from the posting of notices or the delivery thereof to the consignor." In *St. L. & S. F. Ry. Co. v. Tribbey*, 6 Kan. App. 467, 50 Pac. 458, a case very similar to the one at bar, it was held that the printed rules and regulations indorsed on the back of a contract for the transportation of live stock, under the head of "Notice to Agents," was not binding upon the shipper. Mr. Justice Schoonover, in discussing this proposition, says: "It is not only against the policy of the law, but a serious injury to commerce, to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them. If the parties were on an equality in their dealings with each other, there might be some show of reason for assuming acquiescence from silence, but in the nature of the case this equality does not exist, and therefore every intendment should be made in favor of the shipper when he takes a receipt for his property, with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights. It can readily be seen, if the carrier can reduce his liability in the way proposed, he can transact business on any terms he chooses to prescribe." We believe the foregoing cases are in point on the question now under consideration, and are decisive thereof.

Counsel for defendant contends that there is nothing in the case at bar exempting defendant in error from complying with the eleventh paragraph of the live stock contract, which provides, in part, "that, as a condition precedent to a recovery for any damages for delay, loss or injury to live stock covered by this contract, the second party will give notice in writing of the claim therefor to some general officer or the nearest station agent of the first party, or to the agent at destination, or some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of such stock at destination." The above notice was not given before the live stock were removed from the place of destination, and was not given until about a month after the live stock reached Cordell. On this proposition the court instructed the jury as follows: "You are further instructed that the special contract in this case contains the following language: * * * In this connection you are instructed that if you find from the evidence that the cattle in question, at the time they were unloaded, were then injured, or had been injured on the trip from Eddy to Cordell by the gross negligence of the railroad company, defendant, in transporting them, and that the plaintiff, Copeland, at the time had knowledge of such injuries, and with such knowledge un-

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loaded said cattle and removed them from the place of destination without giving the notice provided for in said special contract, the removal of said cattle without giving the notice required would be a bar to Copeland's right to recover damage from the defendant for defendant's negligence in transporting said cattle, but this would not apply if you find that, at the time said cattle were unloaded and removed by plaintiff, Copeland, he did not know of the damages done said cattle, and the damages were such as could not be ascertained by the exercise of reasonable care." We think the foregoing instruction is as favorable to the defendant as could well be.

Paragraph 11, *supra*, of the contract cannot reasonably be construed to have reference to injuries which could not have been ascertained by the exercise of reasonable care. It would be a very harsh rule to hold that by its terms the shipper was bound to serve notice within one day after the delivery of stock, when he could not, by the exercise of reasonable care, discover the damage done until after the expiration of that time. In the case at bar the damage was not such as could be ascertained by an external examination. Overheating, according to Dr. Babcock, the veterinary who testified below, does not manifest itself, as a general rule, until about three days after the cause thereof. At the time of the removal the cattle were only gaunted and restless, which would be a natural condition in the face of such a journey. The plaintiff did not sue for the gaunting of such stock, but only for the loss occasioned by their death. At the time of the delivery none of the cattle had died, and none did die until about two days thereafter. If the rule contended for by counsel for the railway company was followed, and a strict construction given the limitation in paragraph 11, the plaintiff would be entirely deprived, through no fault of his, of his right of recovery.

In the case of *Ormsby v. Union Pac. Ry. Co.* (C. C.) 4 Fed. 170, it was held that a contract between a railroad company and a shipper of horses stipulating that for injury to the animals shipped over the line of the road the owner should make a demand in writing of the agent of the company before removing them from the place of destination, or from the place of delivery, was not applicable where the injury was the illness of the animals, and the extent of such illness could not be known until their removal from the cars, and probably not for some little time after such removal. In the case of *A., T. & S. F. Ry. Co. v. Morris*, 65 Kan. 532, 70 Pac. 651, a case similar to the one at bar, in discussing this proposition, Mr. Justice Greene says: "The shipping contract in question, like any other contract, should be construed in the light of surrounding circumstances, and with a view to carrying into effect the actual intention of the parties. It cannot be said that the company expected that the shipper

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would be compelled to notify it within three hours after the arrival of the cattle of any injuries which they had sustained which were not observable; nor can it be assumed that the shipper contemplated, when signing the contract, that he was bound to such unreasonable requirements. The plaintiff was bound by the conditions in the contract, and he could not recover for any injuries sustained by the cattle which were obvious when the cattle were turned over to him, or which a reasonably careful man similarly situated would have observed, until he had fully complied with the conditions of the contract by giving the stipulated notice. Whether the cattle sustained any injury by reason of the negligence of the company, its agents, or employees, or whether such injuries, if sustained, were discoverable by the defendant before removing them from the yards at Spivey, were questions of fact which the jury, upon conflicting evidence, found against the plaintiff in error. Such findings will not be examined, nor the evidence weighed by this court, when it appears that every material and essential fact necessary to sustain the findings is supported by some evidence, although it may be weak and conflicting."

We have considered all of the grounds of error urged by counsel for defendant, and have examined the proceeding had in the court below with considerable care. We believe that the case below was submitted to the jury upon instructions that stated the law with substantial accuracy, and that the verdict of the jury was amply supported by the evidence. We find no error that would justify this court in setting aside the judgment rendered thereon.

The judgment of the court below is affirmed. All the Justices concur.

THOMAS v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, April 9, 1909.)

[64 S. E. Rep. 220.]

Carriers—Shipment of Goods—Bill of Lading—Conclusiveness.*—

The recitals in a bill of lading, issued by a carrier on the actual receipt of goods, that a specified number of packages were delivered for carriage are conclusive on the carrier, as between it and the consignee or transferee of the bill of lading, who has incurred loss or liability in reliance on the correctness of such recitals.

Appeal from Common Pleas Circuit Court of Sumter County; Geo. E. Prince, Judge.

*See first foot-note appended to *St. Louis, etc., Ry. Co. v. Citizen's Bank* (Ark.), 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290.

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Action by Frank E. Thomas against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

P. A. Willcox and *Mark Reynolds*, for appellant.

L. D. Jennings, for respondent.

JONES, J. In this case the circuit court affirmed the judgment of a magistrate court awarding to plaintiff \$27, the value of 1 ton of cotton seed meal alleged to have been lost out of a shipment of 30 tons of cotton seed meal over defendant's line, the judgment also including \$50 penalty, under an act of February, 1903, for not adjusting and paying the claim within the time required by law. On January 10, 1907, at Columbia, S. C., the defendant issued to the South Carolina Cotton Oil Company its bill of lading, reciting that it had received from the South Carolina Cotton Oil Company 600 sacks of meal in apparent good order, to be delivered in like good order to plaintiff, at Wedgefield, S. C. The defendant received the car containing the shipment from the shipper at Columbia under the shipper's seal, and without counting the sacks. The car reached Wedgefield on January 12, 1907, and on Monday, the 14th, was turned over to the plaintiff, after the defendant's agent at Wedgefield had broken the seal and delivered 10 sacks to one whom he believed was authorized to receive it by the consignee. The consignee testified that he had not authorized the delivery to such person. When the consignee took charge of the car, according to the evidence submitted in his behalf, there were only 569 sacks of cotton seed meal therein, which, with the 10 sacks delivered by defendant's agent, made 579 sacks, or 21 sacks less than the amount called for in the bill of lading. Plaintiff filed a claim with defendant for 20 sacks shortage, amounting to \$27, and, defendant failing to pay within 40 days, plaintiff brought suit for recovery of that sum and the penalty.

The magistrate charged the jury that, "as between the common carrier and the shipper, the bill of lading is not conclusive as to the quantity of goods received, and parol testimony may be introduced to show that a less quantity has been received, but it cannot prevent the party who is to receive the goods from recovering what he loses from the common carrier," and declined to charge that the bill of lading was merely *prima facie* evidence as to the quantity of goods received; the issue being between the consignee for value and the carrier. When the jury came back for further instructions, the magistrate, in answer to an inquiry from the jury, instructed them: "If the plaintiff, Thomas, proves that he lost the meal, then I charge you that the railroad company is responsible for the loss." In view of the frank admission of counsel and the circumstances this last language of the magistrate is to be construed as meaning only to make the de-

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feudant responsible for the shortage between the quantity named in the bill of lading and the quantity delivered to the consignee.

The real question raised by the exceptions is whether a bill of lading, issued by a carrier to the shipper, and transferred to the consignee for value, is as between the consignee and the carrier conclusive evidence as to the receipt by the carrier of the quantity of goods therein mentioned, or is it only *prima facie* evidence thereof? A bill of lading is regarded as having a two fold character—as a receipt for goods delivered, and as a contract for their shipment. In so far as it may be treated as a mere receipt it is generally held that as between the original parties it is not conclusive, but is only *prima facie* evidence of the truth of its recitals, and may be varied or contradicted by parol. Whether as between the carrier and the consignee or transferee, not original parties thereto, the recital as to the receipt of goods is conclusive is a matter of considerable controversy. There is much authority in other jurisdictions for the view that, when no goods have in fact been delivered for shipment, a bill of lading issued by the carrier's station agent is not conclusive evidence of the receipt of the goods, even in the hands of a *bona fide* consignee or purchaser for value, whether the bill of lading was issued by mistake or collusively with the shipper. Such seems to be the law in England (*Grant v. Norway*, 70 E. C. L. 665), and is the rule of the Supreme Court of the United States (*Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998; *Friedlander v. Texas*, etc., R. R. Co., 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991). This doctrine is adopted in several states. *Fellows v. Steamer Powell*, 16 La. Ann. 316, 79 Am. Dec. 581; *B. & O. R. R. Co. v. Wilkens*, 44 Md. 11, 22 Am. Rep. 26; *Williams, Black & Co. v. Wilmington*, etc., R. R. Co., 93 N. C. 42, 53 Am. Rep. 450; *National Bank of Commerce v. Chicago*, etc., R. R. Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566. The reasons for this view rest mainly on the ground that it is not within the real or apparent authority of the carrier's agent to issue a bill of lading for goods not received, and that, a bill of lading not being itself negotiable, the holder can take no better right nor higher equity thereunder than the consignor or shipper.

The contrary view is taken in other states with strong show of reason. *Bank of Batavia v. New York*, etc., R. R. Co., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440; *Sioux City & Pacific R. R. Co. v. First National Bank of Fremont*, 10 Neb. 556, 7 N. W. 311, 35 Am. Rep. 488; *Brooke v. New York*, etc., R. R. Co., 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235, reported in note to 53 Am. Rep. 453; *American National Bank v. Georgia R. R. Co.*, 96 Ga. 665, 23 S. E. 898, 51 Am. St. Rep. 155. The reasons for this view are mainly that the question is not one of negotiability of the instrument, but one of estoppel in pais; that the carrier has clothed the agent with apparent authority to issue a bill of lading;

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that, the agent having done so with full knowledge or full opportunity to know what, if any, goods are tendered for shipment, the principal should be estopped to deny the truth of the recitals as to goods covered thereby; that it is better to cast the loss upon the carrier whose agent made the false representation than upon an innocent holder of the bill of lading who relied upon the representation; that while not strictly negotiable, a bill of lading is quasi negotiable, symbolizing the property described therein, and that title thereto passes by its transfer or delivery; and that it is in the highest degree important to the large commerce known by the carrier to be built upon the transfer of bills of lading that there should be confidence in their recitals.

Whatever may be the true view as to the effect of a bill of lading when no goods were delivered to the carrier, we think that in a case like this, when goods were delivered, and the question is one merely of shortage in the number of packages in an admitted shipment, the representation of the defendant's bill of lading that a specific number of packages was received without any qualification is conclusive upon the carrier, as between the carrier and the consignee or transferee of the bill of lading who has incurred loss or liability in reliance upon the correctness of the representation. It cannot be said that the issuance of the bill of lading was not within the scope of the authority of defendant's agent. It was the duty of defendant's agent to check the number of separate packages received for shipment; and, if the agent chose to accept the shipper's count as his own, the loss should fall upon the carrier who gave the agent authority to issue the bill of lading rather than upon the innocent consignee or transferee who relied upon the recitals therein. Note to *Chandler v. Sprague*, 38 Am. Dec. 414. This latter view is supported by our own cases. In *Benjamin v. Sinclair*, 1 Bailey, 174, the court held, in an action by the master of a vessel against a consignee for freight, that the recital in a bill of lading that the goods were shipped "in good order and well conditioned" could not be contradicted by testimony showing that externally the goods were not in good order; there being no evidence of fraud or imposition. The representation as to the external condition of the goods shipped is not in principle different from a representation as to the number of packages shipped. In *Sanford v. Railway*, 79 S. C. 523, 61 S. E. 74, a case involving a claim for statutory penalty of \$5 per day for delay in shipment, the court held that, when a carrier issues a bill of lading for a car of freight, it cannot be heard to say that it did not have possession of the car at the time of issuing the bill of lading, although it alleged that the car was not received by it until about 20 days after the date of the bill of lading.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

In re NEW YORK HOUSE FURNISHING GOODS CO.

(Circuit Court of Appeals, Second Circuit, April 13, 1909.)

[169 Fed. Rep. 612.]

Sales—Stoppage in Transitu—Right of Buyer—Termination.*—The transitus of goods for the purpose of exercise of the right of stoppage in transitu is not ended until there has been an actual or constructive delivery of the goods to the consignee, for so long as the goods are in the carrier's custody, whether as carrier or warehouseman, at destination, the right of stoppage may be exercised.

Sales—Stoppage in Transitu—Change of Relation.—A carrier cannot by his own will change his character so as to become the buyer's agent or warehouseman without the latter's assent, nor can the buyer change the capacity in which the carrier holds the goods, so as to make him the buyer's bailee, without the carrier's assent, to the prejudice of the seller's right of stoppage in transitu.

Sales—Stoppage in Transitu—Exercise of Right.—A bankrupt purchased certain refrigerators f. o. b. with instructions to ship by mail to New York. The goods were delivered to a carrier on February 13, 1908, who issued a bill of lading therefor. They arrived at destination, freight unpaid, on March 12th, and immediate notice was given to the consignee to remove them. A few days later they were levied on while still in the cars, after which a petition in bankruptcy was filed and a receiver appointed, and on March 25th the seller notified the carrier of its election to exercise its right of stoppage in transitu. Held that, the goods being still in the carrier's possession, the right of stoppage still existed, notwithstanding the levy.

Appeal from the District Court of the United States for the Southern District of New York.

This is an appeal by the receiver of the bankrupt from an order of the District Court, Southern District of New York, directing the receiver to pay to the Home Metallic Refrigerator Company the sum of \$500 now in his hands as the proceeds of

*For the authorities in this series on the subject of the right of stoppage in transitu, see second foot-note of *National Bank v. Baltimore & O. R. Co.* (Md.), 15 R. R. R. 206, 38 Am. & Eng. R. Cas., N. S., 206, where all those preceding it are collected or referred to; *Switzer v. Northern Pac. Ry. Co.* (Wash.), 23 R. R. R. 617, 46 Am. & Eng. R. Cas., N. S., 617 (duty to stop shipment in transitu, because of alleged fraud in the sale of the horses in question); *Georgia R. & B. Co. v. Haas* (Ga.), 23 R. R. R. 536, 46 Am. & Eng. R. Cas., N. S., 536 (right of true owner of property delivered to railroad for shipment to reclaim it); *Atchison, etc., Ry. Co. v. Schirver* (Kan.), 21 R. R. R. 150, 44 Am. & Eng. R. Cas., N. S., 150 (diversion of shipment in accordance with shipper's order, certain conduct of person to be notified of arrival of goods was no justification for carrier's failure to comply with such order).

In re New York House Furnishing Goods Co

the sale of certain goods with costs and disbursements to be paid out of general funds of the bankrupt estate.

H. W. Newburger (*George Edwin Joseph* and *Herbert H. Harris*, of counsel), for appellant.

Fuller & Reuman, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The proceeds in question represent 100 refrigerators which the bankrupt had ordered from the Home Company two months and more before petition was filed; the price was agreed upon f. o. b. cars and instructions given to ship by rail to New York. The goods were on February 13, 1908, delivered to the Chicago, Milwaukee & St. Paul Railway, which issued bill of lading giving the consignee's name and address "New York City, N. Y.," and guaranteeing that the freight should not exceed rates specified therein. The freight was not prepaid. They arrived at the Thirty-third Street freight station of the New York Central & Hudson River Railroad on March 12th. Notice was immediately given by the carrier to the consignee of their arrival, with a request to remove them. The consignee did not remove them, nor make any attempt so to do. A few days later a deputy sheriff, under an execution issued upon a judgment against the house furnishing goods company, called at the freight station and served a notice upon the person in charge that he had levied upon the refrigerators then standing in the cars. On March 18th petition in bankruptcy was filed and receiver appointed. On March 25th the Home Company notified the general freight agent of the New York Central & Hudson River Railroad Company to hold the refrigerators until arrangements could be made relative to their disposal. Arrangements were subsequently made between it and the receiver whereby the freight was paid and the goods removed and sold and the proceeds placed in the hands of the receiver subject to the order of the court.

The only question in the case is whether the right of stoppage in transitu continued in existence when the vendor reclaimed the goods. The general rule of law is well stated in *Hutchinson on Carriers*, §§ 415, 417:

"In the case of railroad companies transporting goods as common carriers, the transitu will not be considered as having come to an end, as soon as the goods have arrived at destination and have been stored, whether such carriers be required to give notice to the consignee or not, or whether their liability be held to cease as carriers upon the arrival and warehouseing of the goods, without more, or not. As long as the goods are in their custody, whether as carriers or warehousemen, they must recognize the right of the vendor to stop delivery. * * * An actual or

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constructive delivery of the goods to the consignee will defeat the right. * * * It is not necessary that the goods should have come into the actual possession of the buyer, to put an end to the right of the vendor. * * * If the consignee, for his own convenience, agree with the carrier to let the goods remain in his warehouse, to be delivered when or as he should want them, or if that be the course of dealing between them, the carrier becomes the warehouseman or agent of the buyer, although he may still have a lien upon them for his freight. But the carrier cannot of his own will change his character so as to become the buyer's agent or warehouseman without the latter's assent; nor can the buyer change the capacity in which the carrier holds the goods, so as to make him a bailee for the buyer, without the carrier's assent. The intentions of both must concur."

Our attention is called to no facts in this case which evidence any such agreement or course of dealing or concurrence as would make the New York Central & Hudson River Railroad the warehouseman of the buyer touching these goods, which the latter did not demand or pay freight on prior to March 25, 1908. The levy or attempted levy by the sheriff in no way operated to defeat the vendor's right of reclamation. *Covell v. Hitchcock*, 23 Wend. (N. Y.) 612.

We find nothing in the authorities cited on appellant's brief in conflict with the statement above quoted. In *Becker v. Hallgarten*, 86 N. Y. 167, the goods had come into "the complete possession and control of the vendees." In *Dixon v. Baldwin*, 5 East, 175, they had passed out of the hands of carrier into the actual possession of the vendee's agent at Hull. The right of stoppage was sustained in *Covell v. Hitchcock*, 23 Wend. (N. Y.) 613, because the warehouseman to whom the goods were delivered was not the general agent of the purchaser. To the same effect is *Harris v. Pratt*, 17 N. Y. 249. In *E. & G. Brooke Iron Co. v. O'Brien*, 135 Mass. 442, the agent of the vendee had chartered two schooners, taken the goods from the shipping agent and loaded them on the vessels. In *Wentworth v. Outhwaite*, 10 Morg. & W. 436, they were actually in the "defendant's warehouse at Leeds, a large shed near the railway terminus, where it was the custom for the defendants to receive goods sent for the vendee." In *Sawyer v. Joslin*, 20 Vt. 172, 49 Am. Dec. 768, they had been landed upon a wharf, half a mile from the vendee's place of business, which wharf was the usual place of the vendee's receiving goods in that town. They were not subject to any lien for freight or charges, and, after they were landed at the wharf, neither the wharfinger, nor any person for him, or for the carrier, had any charge of the goods. In *Biggs v. Barry*, 2 Curtis (U. S.) 259, Fed. Cas. No. 1,402, they had been delivered to "forwarding agents, employed by the buyer, to remain

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with them until the buyer should send orders respecting their destination." This was held to be in legal effect a delivery to the buyer.

The facts in the case at bar will not sustain a holding that the transitus had terminated by March 25th.

The order is affirmed, with costs.

BAKER v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, Feb. 13, 1909.)

[63 S. E. Rep. 611.]

Carriers—Goods—Limitation of Liability—Shipper's Assent.*—Assent by a shipper to a stipulation in a bill of lading limiting the carrier's liability will be presumed from his signature of the stipulation, in the absence of fraud or imposition.

Appeal from Common Pleas Circuit Court of Sumter County; C. G. Dantzlör, Judge.

Action by H. W. Baker against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

P. A. Willcox and *Mark Reynolds*, for appellant.
Lee & Morse, for respondent.

GARY, A. J. This is an action to recover \$185, the value of certain furniture, shipped from Darlington, S. C., to Harvins, S. C., and which was lost in transportation, also to recover the penalty of \$50 for failure to adjust the claim for such loss within the time required by law. The defendant denied each and every allegation of the complaint, and for a defense set up that the plaintiff, at the time of the shipment, entered into a contract with the defendant, whereby, in consideration of a reduced rate, it was agreed that in the event of loss or damage to any of the articles shipped, their value should not exceed \$5 per 100 pounds. The property weighed 1,100 pounds. The jury rendered a verdict in favor of the plaintiff for \$235, and the defendant appealed.

The first exception that will be considered is as follows: "Because his honor erred in not charging the jury, in accordance with defendant's last request to charge, that if they believed the plaintiff signed the contract to release, they could only find a verdict of \$58.30, and in modifying said request, by saying to the jury; 'Provided you find that by signing same he thereby agreed to it'—whereas he should have charged the jury said re-

*See extensive note, 28 R. R. R. 384, 51 Am. & Eng. R. Cas., N. S., 384.

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quest, without any modification, in the absence of any proof by the plaintiff of fraud, misrepresentation, or concealment on the part of the defendant. The best evidence that the plaintiff agreed was the fact that he signed it, and his honor should have so instructed the jury." His honor had previously charged the jury as follows: "Now the law declares when one person signs a contract—that is, contract in writing—he is presumed to have known the contents of that contract, and is bound by the terms and conditions of it, in the absence of fraud, misrepresentation, or concealment." He had also charged the following requests, which were presented by the defendant's attorney: "If you believe from the evidence that the bill of lading shows an agreement between the plaintiff and the defendant by which, for a reduced rate of freight, the plaintiff, in case of loss or damage, agreed to limit value of goods to \$5 per 100 pounds, then in case of loss or damage to said shipment, the plaintiff would be only entitled to recover such limited value, together with the amount of freight paid thereon, if he paid the freight." "In other words, if you find from the evidence, if such evidence there be, that there was a writing signed by the plaintiff, by which he agreed to limit the value, in case of loss, to \$5 per 100 pounds, and that the defendant performed its part of the contract by accepting or charging a reduced rate of freight in case of loss or damage, you could only give a verdict, for the loss or damage limited to \$5 per 100 pounds, of the goods lost, together with the freight paid thereon by plaintiff, if he paid freight." "Where a stipulation for a valid limitation of the carrier's liability is embodied in a receipt, delivered by the carrier to the shipper, and accepted by the latter, the assent of the shipper to such stipulation is presumed, and the limitation thus embodied will be binding upon him as a special contract, in the absence of any evidence of fraud, imposition, or deceit practiced by the carrier." Before modifying the request mentioned in the exception his honor, the circuit judge, had charged the law correctly. In the modification of the request he seems to have been of the opinion that the plaintiff could recover the amount claimed even though he signed that portion of the bill of lading containing the words: "Weight 1,100. Released and value limited to \$5.00 per cwt. in case of loss or damage (stamped)"—in the absence of fraud or misrepresentation, if it appeared from the testimony that he did not otherwise agree to such provision. This conception of the law was erroneous. Mr. Freeman thus states the rule in 88 Am. St. Rep. p. 81 (note): "In the absence of fraud or imposition therefor, and with the exception of the two jurisdictions before mentioned as holding the opposite view (Illinois and Ohio), the rule is well settled, both in this country and in England, that assent to stipulations in a bill of lading limiting the carrier's liability will be conclusively presumed from the acceptance of that instrument by the

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shipper without dissent." The respondent's attorneys, however, rely upon the case of *Jenkins v. Ry.*, 73 S. C. 289, 53 S. E. 480. There are at least two material differences between that case and the one under consideration: In the first place, the plaintiff in that case did not sign the bill of lading; and in the second place, there was an issue whether the words "Release and value limited to \$5.00 per hundred pounds in case of loss or damage" were stamped upon the bill of lading before it was delivered to the plaintiff. These views practically dispose of all questions presented by the exceptions.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

**MERCHANTS' & MINERS' TRANSPORTATION CO. v. EICHBERG et al.
EICHBERG et al. v. CENTRAL OF GEORGIA RY. CO.**

(Court of Appeals of Maryland, Jan. 12, 1909.)

[71 Atl. Rep. 993.]

Carriers—Loss or Injury to Goods—Contracts—Presumptions.—It will be presumed that when letters passed between shippers and a carrier's freight traffic manager setting forth the rates at which the goods would be carried, and the time within which any claim for damages would be settled, were written, the parties contemplated the issuing of bills of lading containing the provisions of the contract.

Carriers—Limitation of Liability—Damages—Burden of Proof.—Under a bill of lading providing that negligence should not be presumed against the carrier, the burden was on the shipper to show, not only injury to the goods, but negligence causing such injury, where a higher rate was charged for carriage under the common-law liability as insurer.

Carriers—Rates of Freight—Insurance of Safety.—In the absence of a contract to the contrary, a carrier of goods is an insurer, but, since they may be injured or destroyed by causes not due to the carrier's negligence, the carrier is as much entitled to be paid a premium for insurance of safe delivery as for labor and expense of carrying them.

Carriers—Limitation of Liability—Negligence—Burden of Proof.—While a carrier cannot contract against its own negligence, it can contract so as to put the burden of proving negligence on one suing therefor.

Carriers—Loss or Injury to Goods—Damages—Claims—Waiver.*—A provision of a bill of lading requiring any claim for loss or damage to be made in writing within 30 days after delivery was waived by the carrier, for its agent raised no objection on that ground to a claim filed after that time.

*See extensive note, 27 R. R. R. 388, 50 Am. & Eng. R. Cas., N. S., 388.

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Carriers—Limitation of Liability—Damage—Measure.—In an action for damage to goods shipped under a bill of lading providing that any loss or damage should be computed at the value of the property at the time and place of shipment, damages should be assessed according to such provision.

Carriers—Limitation of Liability—Damages—Waiver of Provision.—In an action against a carrier for damages to a shipment, the parties may waive a provision of the bill of lading that the amount of any damage should be computed at the value of the property at the time and place of shipment.

Carriers—Injury to Goods—Joint Liability.—An action for damage to a shipment was properly brought in tort jointly against the railway company and the transportation company which contracted to ship the property.

Appeal from Superior Court of Baltimore City; Thos. Ireland Elliott, Judge.

Action by Maurice H. Eichberg and Monte L. Hirsch, copartners as the Paper Mills Company, against the Merchants' & Miners' Transportation Company and the Central of Georgia Railway Company. From a judgment for plaintiffs, the transportation company appeals, and from a judgment for the railway company plaintiffs appeal. First mentioned judgment reversed and new trial awarded; other judgment affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

William S. Bryan, Jr., for plaintiffs.

Charles A. Marshall and John J. Donaldson, for defendants.

WORTHINGTON, J. This is an action of tort brought in the superior court of Baltimore city by the appellees, trading as the Paper Mills Company, against the Merchants' & Miners' Transportation Company and the Central of Georgia Railway Company, as joint defendants, to recover for damages alleged to have been sustained by the plaintiffs through the negligence, improper conduct, lack of skill and care, and wrongful action of the defendants, and each of them, in transporting a large quantity of wrapping paper and paper bags, and also certain machinery from Atlanta, in the state of Georgia, to Baltimore, in the state of Maryland. The case was before this court at the October term, 1907, upon the question of the sufficiency of the service of process on the Central of Georgia Railway, one of the defendants, and some of the facts are set out in the report of that appeal in *Central Ry. Co. v. Eichberg*, 107 Md. —, 68 Atl. 690. The service of process having been held sufficient, the case proceeded to trial in the court below against both defendants, and a

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judgment in that court for \$9,734.76 was obtained against the Merchants' & Miners' Transportation Company alone, the Central of Georgia Railway Company obtaining a judgment in its favor under an instruction of the trial court. The unsuccessful contestants in both instances have appealed to this court.

We will first consider the appeal of the Merchants' & Miners' Transportation Company. The learned judge in the court below by granting the plaintiffs' first prayer practically decided that the whole contract of carriage between the parties is contained exclusively in the two letters, one of date of June 12, 1906, and the other of date of June 25, 1906, which passed between the plaintiffs' and Mr. C. S. Hoskins, freight traffic manager of the Merchants' & Miners' Transportation Company, and which are printed in the record. But we think the true contract is to be found in these two letters, or rather in the one of date of June 25, 1906, and in the bills of lading issued to the plaintiffs by the Central of Georgia Railway Company taken and considered together. The letters set forth merely the rates at which the goods will be carried, and the time within which any claim for damages would be settled. It may well be assumed that, when these letters were written, the well-known usage and custom of issuing bills of lading with the several shipments were within the contemplation of the parties. Indeed, the plaintiffs in their letter of June 12th refer to the "clean B-L of the Central of Georgia for evidence" as to the condition in which the shipments would leave Atlanta, thus clearly indicating that they had in mind the receipts usually issued by carriers when goods are accepted by them for carriage. A similar view was held by the Court of Appeals of New York in the case of *Donovan v. Standard Oil Company*, 155 N. Y. 112, 49 N. E. 678, where the court said: "This instrument [the bill of lading] must be read with the letter referred to under which the plaintiffs entered into the general arrangement in order to ascertain the full extent of their duties and obligations as carriers." Having decided that the bills of lading form part of the contract of carriage, it becomes our duty to construe certain portions of them, which give rise to the controversy in this case. The clause which gives rise to the most important question is contained in the eleventh section of these bills of lading, and is as follows: "Nor shall negligence be presumed against any carrier."

The question is: How does this clause effect the burden of proof? We think it must be given its full force; that is to say, the burden is upon the plaintiffs to show not only the injury, but also the negligence that caused the injury. The common-law presumption of negligence where damage merely is shown is negated by the express stipulation of the contract. It will not suffice to prove merely that the goods were delivered to the carrier in good condition and received by the consignee in a damaged condition,

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but negligence causing the injury must be proven. In the absence of contract, the law makes the carrier an insurer, and, as the goods it carries may be injured or destroyed by many causes not due to its own negligence or want of care, the carrier is as much entitled to be paid a premium for its insurance of their safe delivery at the place of destination as for the labor and expense of carrying them there. *Riley v. Horne*, 15 E. C. L. 551. While the carrier may not contract against its own negligence (1 *Hutchinson on Carriers*, § 450), it may contract so as to put the burden of proving the negligence upon the plaintiff. It was so held in the case of *N. J. S. N. Co. v. Bank*, 6 How. 384, 12 L. Ed. 465, which was followed by our predecessors in the case of *Bankard v. B. & O. R. R.*, 34 Md. 197, 6 Am. Rep. 321. In the former case Mr. Justice Nelson, speaking for the Supreme Court, said: "The respondents having succeeded in restricting their liability as carriers by special agreement, the burden of proving that the loss was occasioned by the want of due care or by gross negligence is upon the libelants, which would be otherwise in the absence of any such restriction." In the case at bar, the contract of carriage provided that, if the shippers elected not to accept the reduced rates for transportation and the condition contained in the bills of lading, they should give notice to the agent of the receiving carrier in writing, and by paying a somewhat higher rate the carrier's common-law liability would attach except as limited by the laws of the United States and of the several states, so far as any such statutes applied. The plaintiffs deliberately chose the reduced rate and thereby assumed under the conditions of the bills of lading which they accepted the burden of proving negligence against the carriers in case any loss or injury to the goods should occur in the course of the transportation, and it is not for this court to relieve them of the burden which they thus assumed. As regards the stipulation in the bill of lading requiring any claim for loss or damage to be made in writing within thirty days after the delivery of the property, we think that such stipulation was waived by the carrier, whose agent with full knowledge raised no objection to the claim on that ground. 5 Am. Eng. E. Law (2d Ed.) 322-325.

No objection is made to the granting of the plaintiffs' second prayer concerning the measure of damages, except on the ground that there is not sufficient evidence to go to the jury as to the market value of the goods at Baltimore, in either an injured or uninjured condition, on their arrival in that city. We think the evidence in this respect too meager, but, as there is a provision in the bill of lading to the effect that "the amount of any loss or damage for which any carrier becomes liable shall be computed at the value of any property at the place and time of shipment under this bill of lading," the measure of damage should be in accordance with this provision, that is, their value should have been

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ascertained at Atlanta as of the days and times of shipment. It was so held by this court in the case of *McCoy v. Erie R. R. Co.*, 42 Md. 498, under a similar provision in the bill of lading in question in that case. Of course, the parties may waive this provision in the present case, if they so desire. We think the proceedings were properly brought in tort jointly against both carriers. *B. & O. R. R. Co. v. Pumphrey*, 59 Md. 399; 1 Poe Pldg. §§ 296, 526, 528; *Mershon v. Hobensack*, 22 N. J. Law, 380. As to the appeal of the Paper Mills Company from the action of the trial court in dismissing the suit as against the Central of Georgia Railway Company, we think such action was proper. The plaintiffs had closed their case without offering any evidence whatever of negligence on the part of this defendant, and by the contract of carriage under which the goods were shipped no negligence could be presumed against it from the mere fact that the goods which had been delivered to it in good condition were received at their destination from the terminal carrier in a damaged condition.

For these reasons we think there was error on the part of the learned judge in the court below in granting the plaintiffs' first and second prayers, and in refusing to grant the defendant's second, eighth, and ninth prayers, and we must therefore reverse the judgment in No. 51, but, as the plaintiffs may be able upon a second trial to adduce evidence of negligence, we will award the plaintiffs a new trial as to the Merchants' & Miners' Transportation Company.

Judgment in No. 62 reversed, with costs and new trial awarded. Judgment in No. 63 affirmed, with costs to the appellee.

ILLINOIS CENT. R. CO. *et al.* v. HOPKINSVILLE CANNING CO.

(Court of Appeals of Kentucky, March 9, 1909.)

[116 S. W. Rep. 758.]

Carriers—Carriage of Goods—Delay—Special Damages.*—Special damages such as shutting down a cannery and the spoiling of tomatoes by the reason of the shut down, resulting from the failure of a carrier to ship a car load of cans in time, cannot be recovered in the absence of a showing that the carrier had notice of facts, which would apprise a person of ordinary prudence that such loss would be anticipated from the delay.

*For the authorities in this series on the subject of the measure and elements of damages for delay in transporting or delivering freight, see foot-note of *Southern Ry. Co. v. Coleman* (Ala.), 27 R. R. 153, 50 Am. & Eng. R. Cas., N. S., 153, where all those preceding it are collected; foot-note appended to *Conheim v. Chicago G. W. Ry. Co.* (Minn.), 30 R. R. R. 165, 53 Am. & Eng. R. Cas., N. S., 165.

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Carriers—Carriage of Goods—Special Damages—Notice.†—Notice to a carrier by the shipper that all consignments of cars should be rushed during the packing season is not sufficient to apprise the carrier that a consignee would be compelled to close down its cannery, and that its tomatoes would be spoiled if the shipment were delayed, so as to permit a recovery for such special damages from the delay.

Carriers—Carriage of Goods—Connecting Carriers—Delay.—Where goods are routed over a particular railroad, and by mistake the initial carrier routes them over another which delays them in transit, the initial carrier is liable with the latter jointly for the delay.

Carriers—Carriage of Goods—Connecting Carriers—Delay—Damages.—The initial carrier in such a case is alone liable for expenses incurred by the consignee in removing the goods where the expenses would not have been incurred if the goods were rightly routed.

Carriers—Carriage of Goods—Delay—Measure of Damages.*—The measure of damages to a consignee for delay in shipping a car load of cans to be used in canning tomatoes is the difference between the market value of the cans at the time when it should have been delivered and its value at the time of delivery, and, in addition to this, the consignee may recover the amount reasonably spent after the car was delayed in telephoning and telegraphing to locate the car and secure its delivery.

Carriers—Carriage of Goods—Delay—Persons Entitled to Sue.—Where a contract of shipment is made by a manufacturer for the buyer's benefit on filling an order, the consignee, being the real party in interest, may recover thereon for a delay in shipment.

Carriers—Carriage of Goods—Notice of Delivery.‡—Where it is customary for a carrier to give notice of the arrival of a shipment of goods, it is liable for a failure to give such notice.

Appeal from Circuit Court, Christian County.

"To be officially reported."

Action by the Hopkinsville Canning Company against the Illinois Central Railroad Company and others for delay and shipment of goods. From a judgment for plaintiff, defendants appeal. Reversed and remanded for new trial.

S. Y. Trimble, Edward P. Humphrey, Trimble & Bell, Trabue, Doolan & Cox, Humphrey, Davie & Humphrey, Hunter Wood & Son, and J. M. Dickinson, for appellants.

Hanbery & Fowler, for appellee.

†See first foot-note of *Matheson v. Southern Ry. Co.* (S. Car.), 28 R. R. R. 130, 51 Am. & Eng. R. Cas., N. S., 130, where all the authorities on the subject, preceding it are collected; last head-note of *Pilcher v. Central of Georgia Ry. Co.* (Ala.), 30 R. R. R. 355, 53 Am. & Eng. R. Cas., N. S., 355; *James v. American Express Co.* (N. J.), 30 R. R. R. 163, 53 Am. & Eng. R. Cas., N. S., 163.

*See foot-note on preceding page.

‡For the authorities in this series on the question whether it is the carrier's duty to give notice of the arrival of freight at its destination, see second foot-note of *Poythress v. Durham & S. Ry. Co.* (N. Car.), 31 R. R. R. 76, 54 Am. & Eng. R. Cas., N. S., 76.

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HOBSON, J. The Hopkinsville Canning Company in the year 1905 made a contract with a number of farmers in the neighborhood to take their tomatoes, and also made a contract with the American Can Company to ship them cans from Indianapolis to pack the tomatoes. On August 22d the canning company telegraphed to the American Can Company to ship them a car load of cans so as to arrive there on the 25th; that they were out of cans. The American Can Company put the cans on a car and delivered them to the Trunk Line at Indianapolis on the night of August the 28th. The Trunk Line delivered them to the Big Four Railroad Company on the morning of August 29th. The Big Four took them to Louisville, arriving there at 6:15 a. m. August 30th, and delivered them to the Illinois Central Railroad Company. According to the routing which had been given when the freight was started, these cars should have been delivered to the Louisville & Nashville Railroad Company at Louisville, but by a mistake of the yardman they were delivered to the Illinois Central. Both the Illinois Central and the Louisville & Nashville had lines to Hopkinsville, but the Louisville & Nashville had put in a spur track to the factory of the canning company, and the Illinois Central had no connection with it; its station being a mile away. The Illinois Central took the car load of cans to Hopkinsville. According to its proof, the cans arrived there September 1st. Next day was Sunday, and the next day was Labor Day. According to its proof, it gave notice of the arrival of the car on Tuesday, September 4th. According to the proof of the canning company, no notice was given of its arrival until the 6th or 7th. The canning company at first refused to receive the cans as the car was a mile from its factory; but on the following Saturday it did agree to take the cans out of the car and commenced hauling them over. When the car did not arrive by August 31st, the canning company began looking around for other cans, and finally secured a car load of cans from Bowling Green, Ky., which arrived on September 5th. It brought this suit against the Big Four Railroad Company and the Illinois Central Company to recover damages on account of the delay in the shipment of the car load of cans, alleging that it had been forced to shut down its factory for want of cans for five days by reason of the delay in the shipment of these cans which should have reached them by August 31st; that during this time \$500 worth of tomatoes which it had bought spoiled; that its necessary expenses while its factory was standing idle were \$500; that it spent \$150 for the car load of cans it got at Bowling Green above its contract price with the American Can Company; that it had spent \$50 in telegraphing and telephoning, and \$75 more in hauling the car load of cans from the Illinois Central station over to its factory. The Illinois Central filed answer denying the allegations of the petition, and on a hearing of the case there was a judgment in favor of the plaintiff against both companies for \$1,250, and they appeal.

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In *Patterson v. I. C. R. R. Co.*, 123 Ky. 783, 97 S. W. 426, the court said: "The general rule is that, where a contract has been broken, the damages which may be recovered for the breach are such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of it. It will be observed that the damages which the plaintiff sought to recover are wholly special damages growing out of the fact that he was feeding a lot of cattle on cotton seed meal and hulls, that the cattle would not eat other feed without loss, and that the delay in getting the cotton seed meal entailed upon him extra labor, expense, and loss in his cattle. The special loss was due to the peculiar circumstances of the plaintiff, and the rule is that, unless such special circumstances are brought home to the other contracting party at the time the contract is made, there can be no recovery of such damages, because they cannot reasonably be supposed to have been in contemplation of both parties at the time they made the contract." In the subsequent case of *I. C. R. R. Co. v. Nelson*, 97 S. W. 757, 30 Ky. Law Rep. 114, after referring to the *Patterson Case* and a number of other cases, the court said: "In harmony with the doctrine announced in the cases cited, it may be said that the rule that obtains as to the measure of damages in an action by the purchaser against the seller for damages because of delay in the shipment of goods or merchandise when the seller had, or it is reasonable to presume that he had, notice of the purpose for which the goods were bought, and that the profit or advantage to be realized therefrom was within the contemplation of the parties at the time of the purchase, will not be applied to a common carrier in an action against it for failing to deliver goods within a reasonable time without notice of the purpose for which they are desired, and when the object of the shipper is not specially brought to the notice of the carrier, and cannot reasonably be inferred from the character of the goods, so that the special use or application for which they are intended cannot reasonably be said to have been within the contemplation of the parties when the contract of shipment was entered into. It is true that common carriers are liable in damages for the unreasonable delay in the transportation of property of all kinds, the extent of the liability being generally the difference between the market value of the goods when they should have been delivered and their value at the time of their delivery; but, when the carrier at the time the goods are received by it has notice of the use for which they are intended, or such use can be reasonably inferred from the character of the goods, and it may be fairly said that the special use to which the goods are to be put was within the contemplation of both parties at the time the contract was entered into, then special damages may be recovered, but it cannot reasonably be said that the cotton seed meal and hulls are such character of

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goods as to put the carrier on notice that their prompt delivery was necessary to avoid loss on cattle being fed by the shipper." Afterward in *Louisville & N. R. Co. v. Mink*, 103 S. W. 294, 31 Ky. Law Rep. 833, the court said: "We deduce from the reasoning in the authorities, and as the simple right of the matter, that the notice that should be given, or be in the minds of both parties, when the contract of shipment is made, should be of such special matters as naturally and reasonably apprise the party to be charged of the probable special consequences of its breach, and should be given to the carrier (if a natural person), or to that agent who entered into the particular contract, or under whose authority it was made."

Under the principles laid down in these opinions, there can be no recovery here of the special damages sustained by the canning company by reason of the tomatoes spoiling or the factory being suspended for want of cans, unless notice was given the carrier at the time the shipment was made of facts sufficient to apprise a person of ordinary prudence that such losses were to be anticipated from the delay of the cans on the journey. To show such notice to the carrier, the plaintiff took the testimony of H. C. Branhām and H. C. Hendrickson, two agents of the American Can Company at Indianapolis who made the shipment. They stated in effect that they had given the railroad companies notice to rush all shipments during the packing season from the fact that all shipments must be treated as perishable goods, because perishable goods were at the other end of the line waiting for them. All shippers of goods wish their customers supplied as quickly as possible. A notice to rush all shipments is not a notice that special damages may be anticipated from the delay in a particular shipment. We have read carefully the testimony of these witnesses, and the above is in substance all that they say. There is not enough in their testimony to warrant a recovery of special damages against the railroad companies. The fact that the car was shipped in the packing season was not notice to the railroad companies that the cans were needed immediately to prevent a factory from standing idle or tomatoes from spoiling. The shipment was made to the order of the American Can Company, and for what purpose the American Can Company, was shipping its own cans to its own order at Hopkinsville the shipment apprised nobody. To say that all cars must be rushed through in the packing season, and that the railroad company must anticipate during the packing season such damages as are here sued for, would be to presume that the business of packing is run without ordinary provision for such delays as may be often anticipated in the shipment of freight by railroads. It is true that notice was given to the carriers after the car did not arrive in time, but this notice added nothing to the liability of the railroad companies. *Patterson v. I. C. R. R. Co.*, 123 Ky.

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783, 97 S. W. 426; I. C. R. R. Co. v. Nelson, 97 S. W. 757, 30 Ky. Law Rep. 114. When the goods were ordered, they were routed on the Louisville & Nashville Railroad. The Big Four by mistake sent them over the Illinois Central Railroad. For this deviation of the goods the Big Four is responsible for the delay occurring on the Illinois Central jointly with that company. In 6 Cyc, 383, the rule is thus stated: "If the carrier in transporting the goods unnecessarily deviates from the usual and ordinary route contemplated in the undertaking, he will be liable for any loss occurring during any such deviation, although such loss is within the recognized exception to the carrier's liability. Indeed, it is said that in departing from the established route the carrier is guilty of misfeasance, and is liable for the value of the goods on the theory of conversion." See, also, to same effect Commonwealth, etc., v. Pendleton (Ky.), 96 S. W. 434. The Big Four brought the goods to Louisville within a reasonable time. There was no unreasonable delay between Indianapolis and Louisville. The proof before us does not show as definitely as it might why the car was delayed between Louisville and Hopkinsville, or how much it was delayed. The records are produced showing just when the car reached Louisville, and when it was turned over to the Illinois Central Railroad, but the records are not produced showing at what time the car reached Hopkinsville or when it left the other two points at which the trains were broken up. If the car had been shipped as it was routed, the expenses which the canning company incurred in unloading the car could have been avoided. For these damages the Illinois Central is not responsible, and the Big Four is alone responsible for this. They are both responsible for the damages growing out of the car being unreasonably delayed between Louisville and Hopkinsville. The measure of such damages is the difference between the market value of the freight at the time when it should have been delivered and its value at the time of delivery; and, in addition to this, the plaintiff may recover the amount it reasonably spent after the car was unreasonably delayed in telephoning and telegraphing to locate the car and secure its delivery. The contract of shipment was made by the American Can Company for the benefit of the plaintiff, and it may recover thereon, as it is the real party in interest. It was incumbent on the carrier to give notice of the arrival of the goods as it was customary to give such notice.

We have considered the deposition of Hendrickson as though the omitted answer was as shown in the affidavits; for this answer, when read with the whole deposition, does not affect its meaning.

Judgment reversed and cause remanded for a new trial and further proceedings consistent herewith.

STATE *ex rel.* RAILROAD COMMISSIONERS *v.* FLORIDA EAST COAST
RY. CO.(Supreme Court of Florida, March 23, 1909. Headnotes Filed April
20, 1909.)

[49 So. Rep. 43.]

Carriers—Regulation—Constitutional Provisions.—Section 30 of article 16 of the state Constitution, which declares that "the Legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature, and shall provide for enforcing such laws by adequate penalties or forfeitures," is not a grant of power to the Legislature, nor is it a limitation upon the power of the Legislature; but it is an express recognition by the Constitution of a power existing in the legislative department of the state government.

Carriers—Regulation.—While a discretion is allowed a common carrier corporation in the discharge of its duties to the public, such discretion must be exercised in good faith, within the limitations of the law, and with reasonable regard for the public welfare, and is subject to review and to lawful regulation.

Constitutional Law—Right to Acquire Property—Due Process of Law—Equal Protection of Laws.*—A lawful governmental regulation of the service of common carriers, though it may be a burden, is not a violation of constitutional rights to acquire, possess, and protect property, to due process of law, and to the equal protection of the laws, since those who devote their property to the uses of a common carrier do so subject to the right of governmental regulation in the interest of the common welfare.

Carriers—Regulation—Schedules—Regulations Prima Facie Reasonable.—The general and special powers given to the Railroad Commissioners by the statute are ample to authorize them to make just and reasonable regulations of the schedules of railroads with reference to connections, so as to afford reasonable convenience and comfort to the public affected by the service; and all such regulations, when made, are by the statute declared to be prima facie reasonable and just.

Constitutional Law—Regulation of Carriers—Due Process of Law.*—Even where a particular regulation causes a pecuniary loss to a

*For the authorities in this series on the constitutionality of statutes prescribing penalties to compel common carriers to perform their duties to the public, etc., see foot-note appended to *McCully v. Chicago, B. & Q. Ry. Co.* (Mo.), 30 R. R. R. 643, 53 Am. & Eng. R. Cas., N. S., 643; first foot-note appended to *Wall-Huske Co. v. Southern Ry. Co.* (N. Car.), 30 R. R. R. 318, 53 Am. & Eng. R. Cas., N. S., 318; foot-note appended to *Davis v. Southern Ry. Co.* (N. Car.), 29 R. R. R. 701, 52 Am. & Eng. R. Cas., N. S., 701.

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common carrier, if the regulation is reasonable with reference to the just demands of the public to be affected by it, and it does not arbitrarily impose an unreasonable burden on the carrier, the regulation will not be a taking of property, in violation of the Constitution.

(Syllabus by the Court.)

In banc. Original mandamus proceedings by the State, on the relation of the Railroad Commissioners, against the Florida East Coast Railway Company. Respondent demurred to the alternative writ. Demurrer overruled.

L. C. Massey, for relators.

Alex St. Clair-Abrams, for respondent.

WHITFIELD, C. J. The alternative writ alleges in effect that the Railroad Commissioners prescribed a schedule for certain passenger trains of the respondent so as to make connections at stated points; that respondent observed the schedule for a time, and then, without notice to or permission from the Railroad Commissioners, disobeyed the order and changed the schedule, so that the connections are not made as contemplated by the action of the Railroad Commissioners.

The command of the writ is to obey the order of the Railroad Commissioners fixing the schedule or to show cause for not doing so.

A demurrer to the alternative writ was filed, and counsel argues that the Railroad Commissioners have no power to make the order prescribing the schedule, and that the writ is defective in its allegations.

Section 30 of article 16 of the state Constitution declares that "the Legislature is invested with full power to pass laws for the correctness of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature, and shall provide for enforcing such laws by adequate penalties or forfeitures."

This section is not a grant of power to the Legislature, nor is it a limitation upon the power of the Legislature; but it is an express recognition of a power existing in the legislative department of the state government. See *State ex rel. Lamar v. Jacksonville Terminal Co.*, 41 Fla. 377, 27 South. 225.

Even if the section were a limitation, and the power of the Legislature were restricted by the provision, it may be that the order of the Railroad Commissioners that has been violated was adopted to correct an abuse or to prevent an unjust discrimination by the common carrier.

While a discretion is allowed a common carrier corporation in the discharge of its duties to the public, such discretion must be exercised in good faith, within the limitations of the law,

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and with reasonable regard for the public welfare, and is subject to review and to lawful regulation. See State *ex rel.* Ellis v. Atlantic Coast Line R. Co., 53 Fla. 650, 44 South. 213, 13 L. R. A. (N. S.) 320.

A lawful governmental regulation of the service of common carriers, though it may be a burden, is not a violation of constitutional rights to acquire, possess, and protect property, to due process of law, and to equal protection of the laws, since those who devote their property to the uses of a common carrier do so subject to the right of governmental regulation in the interest of the common welfare. See State v. Atlantic Coast Line R. Co., 56 Fla. —, 47 South. 969; Corporation Commission v. Railroad, 137 N. C. 1, 49 S. E. 191.

The general and special powers given to the Railroad Commissioners by the statute are ample to authorize them to make just and reasonable regulations of the schedules of railroads with reference to connections, so as to afford reasonable convenience and comfort to the public affected by the service; and all such regulations, when made, are by the statute declared to be *prima facie* reasonable and just.

Even where a particular regulation causes a pecuniary loss to the carrier, if it is reasonable with reference to the just demands of the public to be affected by it, and it does not arbitrarily impose an unreasonable burden upon the carrier, the regulation will not be a taking of property, in violation of the Constitution. See Atlantic Coast Line R. Co. v. North Carolina Corp. Com'rs, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Am. & Eng. Ann. Cas. 398, and note.

The order of the Railroad Commissioners, which the demurrer admits has been violated by the respondent, appears to be within the powers of the Commissioners, and is under the statute *prima facie* reasonable and just. Counsel has not pointed out any particulars wherein the alternative writ is fatally defective in its allegations, and no such defects are apparent.

The demurrer to the alternative writ is overruled, with leave to the respondent to take such further and proper action herein as it may be advised by Monday, April 5, 1909. All concur, except PARKHILL, J., absent on account of illness.

CAUGHMAN *et al.*, RAILROAD COM'RS *v.* COLUMBIA, N. & L. R. Co.

(Supreme Court of South Carolina, April 13, 1909.)

[64 S. E. Rep. 240.]

Constitutional Law—Due Process of Law.*—Civ. Code 1902, § 2069, providing that when, in the judgment of the railroad commissioners, any enlargement of or improvement in stations, mode of operating a railroad, etc., is reasonable and expedient to promote the security, etc., of the public, they shall give information in writing to the railroad company, and, if the company fail within 60 days to adopt the suggestion, action may be brought, is not violative of Const. U. S. Amend. 14, and Const. S. C. art. 1, § 5, forbidding any person to be deprived of property without due process of law, because failing to expressly require a notice and hearing before the commissioners could require the changes, since the constitutional requirement under which such a notice and hearing are necessary is part of the law governing the commissioners, and the presumption is, in view of the silence of the statute as to notice and hearing, that the Legislature intended the commissioners to comply with the Constitution, and not to violate it.

Railroads—Supervision—Power of State.*—A state Legislature has the right to intrust to a board of commissioners such a supervision of railroads as is reasonable and expedient for the public welfare, and a statute providing for such a supervision does not take the management of the railroad property away from the owners.

Mandamus by B. L. Caughman and others, as Railroad Commissioners, against the Columbia, Newberry & Laurens Railroad Company. Demurrer to petition overruled, with leave to answer.

Attorney General Lyon, for petitioners.

Lyles & Lyles, for respondent.

WOODS, J. B. L. Caughman, J. H. Earle, and J. M. Sullivan, railroad commissioners, by their petition ask the Supreme Court to enforce by mandamus an order made by them as railroad commissioners, requiring that the Columbia, Newberry & Laurens Railroad Company "should provide additional side track room at Sligh's, S. C., so that side track room would accommodate, in a way so as to be convenient, patrons loading and unloading at least four cars, and that said side track be completed on or by August 1st, 1908; that a passenger shed be erected at Sligh's, S. C., sufficient in size for the convenience and the accommodation of the traveling public on or by September 1st, 1908." The application is made under section 2119, Civ. Code

*See foot-note appended to preceding case.

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1902, which provides the writ of mandamus as a remedy for neglect or refusal of a railroad company to comply with the rules and regulations of the railroad commissioners within the limits of their authority.

The petition alleges that the order was made because of complaint made to the railroad commissioners by citizens residing in the vicinity of Sligh's, alleging that the Columbia, Newberry & Laurens Railroad Company was furnishing insufficient accommodation at said point for passengers traveling on said road, and insufficient facilities for receiving and delivering freight at said point, in that there was no sufficient passenger or freight depot, and in that there were insufficient side track facilities for the handling, receiving, and delivery of freights received and delivered at said point, and asking that said railroad company be compelled to furnish a suitable passenger station and sufficient side tracks to accommodate not less than four cars." The petition for mandamus further sets out that the order above recited was made after notice to the respondent and investigation of the complaint, including the hearing of the respondent; that after the order was made the commissioners, on the request of the respondent, granted to it a full rehearing of the whole matter; that, after such rehearing, the commissioners decided that the order should remain in force, and caused the same to be duly served on the respondent; and that, though more than 60 days have elapsed, the respondent has failed to comply with the order. The respondent demurred to the petition on the ground that "it does not state facts sufficient to constitute a cause of action, in that the statute or statutes of the state, under which the board of railroad commissioners purported to act, are, and always have been, null and void and of none effect upon the following grounds: (a) That the said statute or statutes violate and are repugnant to the fourteenth amendment to the Constitution of the United States, section 1, and article 1, § 5, of the Constitution of the state of South Carolina, in that it or they deprive your respondent of its liberty and property without due process of law, in that the said statute or statutes make no provision for notice to the railroads of the hearing before the railroad commissioners, from which the said orders of the commission are to result, and in no way require an opportunity to be heard to be given the railroads before or after the passage of the said orders. (b) That the said statute or statutes violate and are repugnant to the aforesaid section of the Constitution of the United States and of this state, in that it or they attempt to take the whole and entire management of the railroads of this state from the hands of their owners, and place it in the hands of the board of railroad commissioners; thus placing upon your respondent and the other railroads of this state burdens beyond

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the duties they owe the public, and depriving your respondent of its liberty and property without due process of law."

The Constitution of South Carolina provides: "A commission is hereby established to be known as 'the Railroad Commission,' which shall be composed of not less than three members, whose powers over all transporting and transmitting corporations, and duties, manner of election and term of office shall be regulated by law; and until otherwise provided by law the said Commissioners shall have the same powers and jurisdiction, perform the same duties and receive the same compensation as now conferred, prescribed and allowed by law to the existing Railroad Commissioners. * * *" Article 9, § 14. By section 2067, Civ. Code 1892, the railroad commissioners are given general supervision of all railroads. By section 2068 they are required to apply for injunction or mandamus against any railroad company which after notice continues to violate any law or neglects "in any respect or particular to comply with the terms of its charter, or with the provisions of any of the laws of the state, especially in regard to the connections with other railroads, the rates of toll, and the time schedule." Section 2069 thus confers powers and imposes duties with more particularity: "Whenever in the judgment of the railroad commissioners, it shall appear that repairs are necessary upon any such railroad, or that in addition to the rolling stock, or any enlargement of, or improvement in, the stations or station houses, or any modification in the rates of fare for transporting freight or passengers, or any change in the mode of operating the road and conducting its business, is reasonable and expedient in order to promote the security, convenience, and accommodation of the public, they shall give information, in writing, to the corporation of the improvements and changes which they adjudge to be proper; and if the said company shall fail, within sixty days, to adopt the suggestions of said commissioners, they shall take such legal proceedings as they may deem expedient, and shall have authority to call upon the Attorney General to institute and conduct such proceedings." There is no express provision of the statute that the railroad commissioners shall give notice and an opportunity to a railroad company to be heard before having imposed upon it the burden of making the enlargements, improvements, or changes which the commissioners may deem reasonable and expedient; and it is contended by respondent that the absence from the statute of such express provision makes the statute unconstitutional, because it contemplates depriving the respondent of its liberty and property without due process of law. The statute providing for railroad commissioners has been before this court in a number of cases, but in none of them was this question made or decided. The leading case which seems to give some support to the position taken by the respondent is *Chicago, M. & St. P. Ry. Co. v.*

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Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970. The question there arose on rates of freight fixed by the railroad commission. In declaring the act as construed by the Supreme Court of Minnesota to be unconstitutional the court said: "No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declare what it is to declare, no opportunity provides for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at." The courts of New York, Indiana, and Virginia in considering the same principles as applied to special taxes or assessments on property held that the statute must in terms provide for notice and opportunity to the property owner to be heard or it will be unconstitutional as imposing a special burden without a hearing, and therefore depriving a citizen of his property without due process of law. *Stuart v. Palmer*, 74 N. Y. 188, 30 Am. Rep. 289; *Kuntz v. Sumption*, 117 Ind. 1, 19 N. E. 474, 2 L. R. A. 657; *Violett v. Alexandria*, 92 Va. 561, 23 S. E. 909, 31 L. R. A. 382, 53 Am. St. Rep. 825. These decisions cannot be sustained either on principle or by authority. It cannot be doubted that the respondent was entitled, as a constitutional right, to notice and hearing before the railroad commissioners could impose upon it the burden of making the changes in its station and track at Sligh's, and it follows, if the statute purported to authorize the imposition of the burden without notice to the respondent and opportunity to be heard, it would be unconstitutional. But express statutory requirement for such notice and hearing is not essential, for the reason that the constitutional requirement that there shall be notice and opportunity to be heard is a part of the law governing the railroad commissioners. As the statute is silent on the subject, the presumption is that the Legislature intended for the commissioners to comply with the Constitution, not to violate it. The requirement that the burden imposed by them in regulating the business of the railroads should be reasonable and expedient in order to promote the security, convenience, and accommodation of the public implies, that they shall make an investigation and inquiry in order to ascertain what is reasonable, and that they shall, in pursuing the investigation and inquiry, adopt, in their discretion, any suitable procedure not forbidden by law. The argument comes to this: The railroad commissioners are under two laws, namely, the statute law of the state, which confers upon them certain powers over railroads, and the constitutional law of the

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state and of the United States, which requires that they shall exercise the powers conferred by statute only by due process of law; that is, after giving the railroad company due notice and opportunity to be heard. A statute is invalid which requires something to be done which is forbidden by the Constitution, but it cannot be essential to the validity of a statute that it should enjoin obedience to the Constitution. The great weight of authority is to the effect that while notice of a special burden or duty which a board such as this proposes to impose must be extended, and an opportunity to be heard on the rightfulness of the exactions must be given, it is not necessary that the statute under which the board acts should expressly provide notice. *Paulsen v. Portland*, 149 U. S. 30, 13 Sup. Ct. 750, 37 L. Ed. 637; *Chicago, B. & Q. R. R. v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. Ed. 948; *French v. Barber A. P. Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; *Naylor v. Harrisonville*, 207 Mo. 341, 105 S. W. 1074; *Shannon v. Portland*, 38 Or. 393, 62 Pac. 53; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781; 8 Cyc. 1102.

The second ground of demurrer has no foundation. No attempt is made by the statute to take the management of the railroad property of the state away from the owners. The statute provides for nothing more than such supervision of railroads as is reasonable and expedient for the public welfare. It has long been settled that a state Legislature has the right to intrust such supervision to a board of commissioners. *Stone v. Farmers' L. & T. Co. (Railroad Commissioner Cases)* 116 U. S. 307, 6 Sup. Ct. 388, 1191, 29 L. Ed. 636.

The judgment of this court is that the demurrer be overruled, and that the respondent have 20 days from the filing of this decree to answer the petition.

UNITED STATES *v.* UNION PAC. R. CO.

(Circuit Court of Appeals, Eighth Circuit, February 15, 1909.)

[169 Fed. Rep. 65.]

Pleading—Construction—General and Specific Allegations.—A general averment in a pleading is always controlled and limited by specific allegations on the same subject-matter.

Carriers—Interstate Carriers of Live Stock—Twenty-Eight Hour Law—"Willfully."—In Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), known as the "28-hour law," which prohibits carriers of live stock from keeping the same confined in cars, etc., for more than 28 consecutive hours without unloading for rest, water, and feeding, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight, and imposes a penalty on any carrier which "knowingly and willfully" fails to comply with its provisions, the word "willfully" is not used as implying a vicious or evil intent, but as meaning intentionally or voluntarily.

Carriers—Carriers of Live Stock—Violation of Twenty-Eight Hour Law—Defenses.—A great and unusual press of business does not, unexplained and of itself, excuse the confinement of live stock by a railroad company beyond 28 hours limited by Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), nor constitute a defense to an action to recover the penalty for its violation.

In Error to the Circuit Court of the United States for the District of Wyoming.

Timothy F. Burke (*George P. McCabe* and *Edward T. Clark*, on the brief), for the United States.

John W. Lacey, for defendant in error.

Before VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was an action at law instituted by the United States to recover a penalty from the defendant railroad company, a carrier of interstate commerce, for alleged violation of Act Cong. June 29, 1906, 34 Stat. 607, c. 3594 (U. S. Comp. St. Supp. 1907, p. 918), which prohibits confinement of live stock in cars for more than 28 hours without unloading for rest, water, and feeding. The petition stated facts constituting a cause of action under the statute, and particularly stated that the railroad company confined the live stock "knowingly and willfully." The answer contained an admission that defendant received the stock for carriage, that it was confined en route, and not unloaded for a period of more than 36 hours. It then averred as follows:

"And defendant denies that its failure to unload the said live

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stock in accordance with law was in any way willful or from avoidable cause which could have been anticipated by the exercise of due diligence and foresight; but, on the contrary, avers that the said failure was wholly caused by the great and unusual press of business both on the tracks of the defendant and at its stockyards, causing delays at the meeting points of its trains, and failures of its engines, both those carrying the cars aforesaid and those drawing other trains which affected and delayed the train carrying the said live stock and alone caused the said live stock to be confined beyond the time limited by law."

The sufficiency of this answer as a defense was challenged by demurrer, which was overruled, and, plaintiff declining to plead further, final judgment was rendered in favor of the defendant. Due exception having been preserved, the case is brought here by writ of error for review. Did the answer state a defense? Section 1 of the act of June 29, 1906, provides that no railroad engaged in interstate commerce in the transportation of cattle, sheep, swine, or other animals shall, without the written request of the owner or person in custody thereof, "confine the same in cars * * * for a period longer than twenty-eight consecutive hours without unloading the same in a human manner into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight." The provisions of section 2 are immaterial for our present inquiry. Section 3 provides "that any railroad" engaged in interstate commerce "* * * who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars." Section 4 provides "that the penalty created by the preceding section shall be recovered by civil action. * * *" From the foregoing it appears that section 1 creates a duty to be performed by carriers and that section 3 imposes a penalty not for the failure to perform the duty, but only when the carrier "knowingly and willfully" fails in that regard. The defendant by not denying the averment of the petition in that regard admitted that it "knowingly" failed to unload the stock.

It is contended that the answer puts in issue the allegation of the petition that defendant's failure to unload the stock was willful and the allegation that defendant was not prevented from unloading the stock by an unavoidable cause which could not have been anticipated by diligence and foresight, and that as a result of these denials of material averments an issue of fact was joined with necessitated the overruling of the demurrer. The answer, after admitting that the stock was not unloaded, and denying that the company's failure to unload was willful or from

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avoidable cause, proceeded in an unbroken sentence to declare as follows:

"But, on the contrary, avers that the said failure was wholly caused by the great and unusual press of business, * * * which alone caused the said live stock to be confined beyond the time limited by law."

It is a familiar principle of pleading and one repeatedly recognized by this court that a general averment is always controlled and limited by specific allegations on the same subject-matter. *Boatmen's Bank v. Fritzlen*, 68 C. C. A. 288, 135 Fed. 650, 659; *Hayes-Young Tie Plate Co. v. St. Louis Transit Co.*, 70 C. C. A. 1, 137 Fed. 80.

Applying this rule, the conclusion follows that the denial of willfulness or avoidable cause must be treated as limited or explained by the words which immediately follow it, and that the pleading taken as a whole means that by reason of the alleged great and unusual press of business which "wholly" and "alone" caused the failure to unload the cattle, and for that reason only there was no willfulness, but there was an unavoidable cause.

Does the fact that the defendant, as a sole result of a great and unusual press of business which occasioned delays at its meeting points and inability of its engines to do the work, knowingly confined live stock committed to it for transportation more than 28 hours without unloading it, amount to a denial of the allegation of willfulness? Counsel for defendant contend that the word "willfully" as employed by the statute necessarily implies an evil purpose or bad motive, and have in their brief collected and reviewed many cases dealing with the meaning of this word. We find no occasion, however, to follow them through this maze of authority. The word is here employed in connection, not with a crime or offense *malum in se*, but with an offense purely statutory subjecting the offender to a civil action only. In view of our former rulings on this question, we are of opinion and so hold that as here employed the word means only the intentional doing of an act forbidden by the statute.

We held in *Armour Packing Co. v. United States*, 82 C. C. A. 135, 153 Fed. 1, 14 L. R. A. (N. S.) 400, that:

"A simple purpose to do the act forbidden, in violation of the statute, is the only criminal intent requisite to a conviction of a statutory offense which is not *malum in se*."

The Supreme Court (209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681), reviewing the same case, said:

"While intent is in a certain sense essential to the commission of a crime, and in some classes of cases it is necessary to show moral turpitude to make out a crime, there is a class of cases within which we think the one under consideration falls, where purposely doing a thing prohibited by statute may amount to an offense, although the act does not involve turpitude or moral wrong."

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We approved and applied this definition in the case of Chicago, St. P., M. & O. Ry. Co. v. United States (C. C. A.), 162 Fed. 835, and discover no reason for departing from it in this case. To hold that some evil purpose or bad motive must be shown in order to constitute a cause of action under section 3 of the act of June 29, 1906, would in our opinion thwart the obvious purpose of legislation. It can hardly be conceived that any reputable carrier would deliberately and designedly because of ill will or other malevolent feeling towards the dumb animals or their owners fail to conform to the reasonable and humane requirement of the law. If the law be operative only to restrain the possible exercise of such evil and perverse disposition, it would have little, if any, scope of operation. The real purpose of the legislation in our opinion was to alleviate the condition of dumb animals in transit. The desire to curtail expense and promote economy of operation naturally encourages indifference to if not a disregard of every impediment to quick and cheap transportation. The act of June 29, 1906, we think, was aimed at this natural propensity, and is a condemnation of indifferent more than malevolent conduct. So far as the dumb animals are concerned, the effect is the same in either case. They would suffer just as much if deprived of rest, water, and food by indifference of the carrier as they would by his malevolence. The meaning we ascribe to the word "willfully" gives a reasonable scope of operation to the act, while the meaning contended for by defendant's counsel practically nullifies it. The answer admits that the defendant knowingly—that is, intentionally—kept the live stock confined in cars without unloading for more than 28 hours, and did this merely because of a great and unusual press of business as there stated. This in our opinion is an admission that it was willfully done within the true meaning of the statute. Otherwise we must concede, which we cannot do, that a mere press of business justifies a disregard of the law.

Did the great and unusual press of business as described in the answer amount as a matter of law to "an accidental or unavoidable cause which could not be anticipated or avoided by the exercise of due diligence and foresight" within the true meaning of section 1 of the act in question? We think not. It might constitute, when taken in connection with other facts and circumstances attending a transportation of live stock, some evidence of such a cause; but in itself it cannot in our opinion constitute that cause. If it could a transportation company would have it in its power to create, *ad libitum*, a cause which would justify its disobedience of the law. The pleadings do not raise the question whether a press of business may not in some circumstances not reasonably to have been anticipated be so great and unusual as to justify continuous confinement of live stock beyond 28 hours. We therefore refrain from expressing any opinion

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on that subject. All we are called upon to decide, and all we do decide, is that a great and unusual press of business does not, unexplained, and of itself, excuse confinement of live stock beyond the time limited by law.

It results that the facts as pleaded in the answer constitute no defense, and that the Circuit Court erred in overruling the demurrer. The judgment is therefore reversed, with directions to sustain the demurrer.

BELT RY. CO. OF CHICAGO v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit, February 3, 1909. On Rehearing, March 18, 1909.)

[168 Fed. Rep. 542.]

Railroads—Interstate Commerce—Safety Appliance Acts.*—Defendant owned a railroad located wholly in Cook County, Ill. Its road constituted a belt which intersected the trunk lines leading into Chicago, and forming, by means of Y's, direct physical connection with such trunk lines. Defendant's business consisted entirely of transporting cars between industries located along its line and trunk lines and between such trunk lines, for which it received an arbitrary charge per car, which was collected monthly from the railroad companies, defendant having no dealings with shippers. Defendant paid no attention to the class of traffic, but acted as an agent for the trunk lines in transferring cars. Defendant on the occasion in question moved a train of freight cars, containing one consigned from a point in Illinois and destined to Wisconsin, from the tracks of the Chicago & Eastern Illinois Railroad to those of the Chicago & Northwestern Railroad. Held, that such transfer constituted in effect a continuous carriage over both such roads, so that defendant with respect thereto was engaged in interstate commerce, and was within the safety appliance acts in relation to power brakes. Act Cong. March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174); Act. Cong. April 1, 1896, c. 87, 29 Stat. 85; Act Cong. March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885).

Seaman, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

*For the authorities in this series on the question whether or not a carrier was engaged in interstate commerce on a certain occasion, see second foot-note of *Patterson v. Missouri Pac. Ry. Co.* (Kan.), 29 R. R. 695, 52 Am. & Eng. R. Cas., N. S., 695; first foot-note of *United States v. Colorado & N. W. E. R. Co.* (C. C. A.), 27 R. R. 758, 50 Am. & Eng. R. Cas., N. S., 758.

Belt Ry. Co. v. United States

William J. Henley, for plaintiff in error.

James H. Wilkerson, Luther W. Walter, and Philip J. Doherty, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. The writ is addressed to a judgment assessing a penalty against plaintiff in error for an alleged violation of the provisions of the Safety Appliance acts in relation to power brakes. Act Cong. March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174); Act Cong. April 1, 1896, c. 87, 29 Stat. 85; Act Cong. March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885). Certain questions relating to the purpose, scope, and validity of this legislation are considered in *Wabash R. Co. v. U. S.*, and *Elgin, etc., R. Co. v. U. S.* (herewith decided), 168 Fed. —.

The only assignments presented and discussed by plaintiff in error are that the court erred in refusing to direct a verdict of not guilty, and in giving the following instruction:

"The question therefore presents itself, and it is a legal question, was the Belt Company, at the time it moved this string of 42 freight cars, containing a car originating in Illinois and destined to Wisconsin, engaged in interstate commerce? I charge you that when a commodity originating at a point in one state and destined to a point in another state is put aboard a car, and that car begins to move, interstate commerce has begun, and that interstate commerce it continues to be until it reaches its destination. If, between the point of origin of this commodity and the point of destination of this commodity, the car in which it is being vehicled from origin to destination passes over a line of track wholly within a city, within a county, or within a state, the railway company operating that line of tract while moving this commodity, so originating and destined from one point to another point, intrastate, is engaged in interstate commerce."

Was there sufficient evidence to warrant the jury in finding that in hauling the train in question plaintiff in error as a common carrier was "engaged in interstate commerce by railroad?"

The railroad tracks of plaintiff in error lie wholly within Cook county, Ill. There are 21 Miles of main line and about 90 miles of switching and transfer tracks. The main line constitutes a belt that intersects the trunk lines leading into Chicago. By leads and Y's direct physical connection with the trunk lines is maintained. Plaintiff in error's business consists in transporting cars between industries located along its line, between industries and trunk lines, and between trunk lines. The first two kinds need not be noticed, as the transportation here involved was between trunk lines. The train in question contained, among others, a car laden with lumber, and consigned from a point in Illinois on the Chicago & Eastern Illinois to a point in Wisconsin on the Chicago & Northwestern. This car was taken by

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plaintiff in error from the tracks of the Eastern Illinois over the Belt Line and put on the tracks of the Northwestern. For services of this kind plaintiff in error makes arbitrary charges of so much a car, which are collected monthly from the railroad companies for which the services are rendered. In such operations plaintiff in error has no dealings with the shippers, and pays no attention to the class of traffic. Its relation to the traffic was stated by the general superintendent, as follows:

"The Belt Company acts practically as an agent for the trunk lines in the handling of cars from one connection to another through its yards."

In *United States v. Geddes*, 131 Fed. 452, 65 C. C. A. 320, defendant as receiver was operating a narrow-gauge railroad that lay wholly in Ohio. "At Bellaire it connected with the Baltimore & Ohio Road, in the sense that it received from the Baltimore & Ohio freight from other states marked for points on its line, and delivered to the Baltimore & Ohio freight from points on its line marked for other states, in the following manner: There was no interchange or common use of cars, the gauges of the two roads being different. The cars of the defendant road were used on its own line. But a transfer track ran from the main line of the Baltimore & Ohio to the terminal station of the defendant road, so that the freight cars of the two roads could be placed alongside adjoining platforms, and the transfer of freight made by the use of trucks handled by the Baltimore & Ohio men. No through bills of lading for such freight were issued by either road, no through rate was fixed by mutual arrangement, and no conventional division of a through freight charge was made." The Circuit Court of Appeals for the Sixth Circuit decided that the narrow-gauge cars in question were not subject to the safety appliance act, holding that a common carrier was not "engaged in interstate commerce by railroad" within the meaning of the safety appliance act unless, referring to the definition in the original interstate commerce act, it was "engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used, under a common control, management, or arrangement for a continuous carriage or shipment" from one state to another. The equipment of a narrow-gauge railroad which lay wholly in Colorado, and which was similarly endeavoring to conduct a separate and independent business, was held by the Circuit Court of Appeals for the Eighth Circuit to be within the safety appliance act. *U. S. v. Colorado, etc., R. Co.*, 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167. Plaintiff in error argues the present case as if the judgment could not properly be affirmed without our adopting the decision in the Eighth Circuit as against that in the Sixth. In our judgment the question presented to those courts is excluded from our consideration by certain distinguishing and controlling facts. The narrow-

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gauge track had no direct physical connection with the broad-gauge tracks of the interstate trunk lines, and so no cars from other states, laden with goods from other states, were hauled on the local highway. The Belt Line physically connected its tracks with those of the Eastern Illinois and of the Northwestern, so that a continuous highway across state lines was formed, on which interstate traffic, loaded on interstate cars, was moved from origin to destination without change of cars. The narrow-gauge road, by limiting its bills of lading to points on its own lines, endeavored to escape being held a common carrier engaged in interstate transportation. The Belt Line, issuing no bills of lading because of having no dealings with the shipper or with any one on his behalf, performing its gateway service on account of and as agent of the trunk lines, made its tracks the track of its principals. Consequently the character of the transportation should be determined by considering the transportation as the act of such principals. Trunk-line yards are in some instances so related to each other that through cars can be transferred without the intervention of a go-between. We are of opinion that the transportation in question was the same in legal effect as if the Eastern Illinois by means of its own locomotive and track had put the through car on the Northwestern's track. In this view there was evidence from which the inference of fact might warrantably be drawn by the jury that there was a common arrangement for a continuous carriage over the Eastern Illinois and the Northwestern; and so, with respect to the movement in question, plaintiff in error was engaged in interstate transportation.

When the portion of the charge complained of is read in the light of the undisputed facts, we see no basis for saying that the substantial rights of plaintiff in error were injuriously affected.

The judgement is affirmed.

DE ROCHEMONT *v.* NEW YORK CENT. & H. R. R.

(Supreme Court of New Hampshire, Rockingham, Jan. 5, 1909.)

[71 Atl. Rep. 868.]

Attachment—Property Subject to—Freight Cars Not in Use.*—Freight cars of a railroad when not in actual use may be attached like other personal property, as against the objection that they are needed to enable the railroad to perform its public duty.

Commerce—State Regulations—Incidental Interference with Interstate Commerce.—The enforcement of a valid state statute will not be stayed merely because it may incidentally affect interstate commerce.

Commerce—State Attachment Laws—Railroad Cars.†—Pub. St. 1901, c. 220, §§ 1, 2, making all property liable to be taken in execution, subject to attachment, and defining exempt property, is valid, and an attachment of a freight car of a railroad not in actual use does not directly affect interstate commerce.

Commerce—Attachment of Cars of Foreign Railroad.—Rev. St. U. S. § 5258 (U. S. Comp. St. 1901, p. 3564), authorizing every railroad to carry over its road freight and property on their way from any state to another state, and to connect with roads of other states so as to form a continuous line for the transportation of the same to the place of destination, gives railroads the right to engage in interstate business, and to become jointly interested with roads in other states in interstate business originating on their lines; and a foreign railroad, contracting with a domestic railroad for the through shipment of cars, stands on the same footing as the domestic railroad, and the statute does not forbid the attachment of a car of the foreign railroad when in the state and not in actual use.

Commerce—State Attachment Laws—Railroad Cars.—The object of Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), forbidding railroads from giving preferences to persons or places, etc., is to compel railroads to carry for all on equal terms and for a fair price, without unnecessary delay, and the act is not in conflict with a state statute permitting the attachment of freight cars when not in actual use.

*For the authorities in this series on the subject of attaching railroad property, see foot-note of *Seibels v. Northern Cent. Ry. Co.* (S. Car.), 29 R. R. R. 247, 52 Am. & Eng. R. Cas., N. S., 247, where all those preceding it are collected are referred to.

†For the authorities in this series on the subject of state regulations which may interfere with interstate commerce, see foot-note of *Atlantic Coast Line Ry. Co. v. Commonwealth* (Va.), 11 R. R. R. 399, 34 Am. & Eng. R. Cas., N. S., 399, where all those preceding it are collected, first foot-note of *Southern Ry. Co. v. Grizzle* (Ga.), 30 R. R. R. 715, 53 Am. & Eng. R. Cas., N. S., 715; foot-note of *State v. Chicago, etc., Ry. Co.* (Wis.), 30 R. R. R. 16, 53 Am. & Eng. R. Cas., N. S., 16; *Seibels v. Northern Cent. R. Co.* (S. Car.), 29 R. R. R. 247, 52 Am. & Eng. R. Cas., N. S., 247.

De Rochemont v. New York Cent. & H. R. R

Transferred from Superior Court, Rockingham County; Pike, Judge.

Action by Hetty E. De Rochemont against the New York Central & Hudson River Railroad. The question of the validity of the attachment of a car of defendant was transferred from the superior court. Case discharged.

The defendants do not own or operate a railroad in this state, and have no place of business here, but they have a contract with the Boston & Maine Railroad whereby each corporation sends its cars over the road of the other. Each pays the other for the use of a car so sent, from the time of its receipt until its return, and has a right to load it on the return journey, provided it is routed toward the point at which it was received. The car in question was loaded in the state of New York for Greenland, N. H., was unloaded as soon as it arrived at Greenland, and was attached before the Boston & Maine Railroad had time to return it to the defendants. The defendants appeared specially, and moved to dismiss (1) because of their contract with the Boston & Maine Railroad; and (2) because the car was being used in interstate business at the time of the attachment.

Samuel W. Emery, Jr., for plaintiff.

John W. Kelley, for defendants.

YOUNG, J. 1. The fact that the Boston & Maine Railroad is not party to this proceeding is an answer to the defendants' first position. It will be time enough to consider whether that corporation had an interest in the car, which the sheriff was bound to respect, when it sues him for attaching the property. *Southern R. Co. v. Brown* (Ga.) 62 S. E. 177.

2. It was decided in *Boston, etc., R. R. v. Gilmore*, 37 N. H. 410, 72 Am. Dec. 336, that sections 1 and 2, c. 184, Rev. St. (Pub. St. 1901, c. 220, §§ 1, 2), authorized the attachment of freight cars which were not in actual use, as well as other property belonging to a railroad; that is, the mere fact that railroads are public service corporations does not render their property exempt from attachment, even though it is needed to enable them to perform their public duty. Although that case holds that freight cars may be attached when not in actual use, the question whether the attachment of such property is forbidden by the commerce clause of the federal Constitution, or by the laws Congress has enacted in pursuance of the power vested in it by that clause, was neither raised nor considered; so, even if the defendants in that action were in fact engaged in interstate commerce, the case is not decisive of the present defendants' contention that the attachment of the car in question was an illegal interference with it. *Wyatt v. Board of Equalization*, 74 N. H. 552, 70 Atl. 387.

Although the precise question raised by the defendants' motion

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to dismiss has never been considered by this court, it has been considered by the courts of Georgia, West Virginia, South Carolina, Illinois, Minnesota, and the Eighth Judicial Circuit of the United States. The Georgia court holds that such an attachment is not an illegal interference with interstate commerce. *Southern, etc., Co. v. Railroad*, 127 Ga. 626, 56 S. E. 742, 9 L. R. A. (N. S.) 853, 119 Am. St. Rep. 356. The West Virginia South Carolina, Minnesota, and federal courts hold that it is an illegal interference with interstate commerce. *Wall v. Railway*, 52 W. Va. 485, 44 S. E. 294, 64 L. R. A. 501, 94 Am. St. Rep. 948; *Shore v. Railroad*, 76 S. C. 472, 57 S. E. 526; *Connery v. Railroad*, 92 Minn. 20, 99 N. W. 365, 64 L. R. A. 624, 104 Am. St. Rep. 659; *Davis v. Railroad (C. C.)* 146 Fed. 403. The Illinois court holds that the statutes of that state do not authorize the attachment of such a car. *Michigan Central R. R. v. Railroad*, 1 Ill. App. 399. All the courts, therefore, which have considered the question, except those of Georgia and possibly California (*Humphreys v. Hopkins*, 81 Cal. 551, 22 Pac. 892, 6 L. R. A. 792, 15 Am. St. Rep. 76), hold that such attachments are void; but they do not agree as to why they are void, nor lay down any rule to determine what constitutes an interference with interstate commerce, within the meaning of the federal Constitution. The reasons the defendants urge for holding the attachment void are that it is forbidden (1) by the commerce clause of the federal Constitution; (2) by section 5258 of the Revised Statutes of the United States; and (3) by the interstate commerce act.

(1) Is this attachment forbidden by the commerce clause of the federal Constitution? Although the Supreme Court of the United States has not passed upon the precise point involved in this case, it has frequently considered the question of what constitutes an illegal interference with interstate commerce (*Galveston, etc., Ry. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031; *The Winnebago*, 205 U. S. 354, 27 Sup. Ct. 509, 51 L. Ed. 836; *Delamater v. State*, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724; *Hatch v. Reardon*, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415; *Martin v. Railroad*, 203 U. S. 284, 27 Sup. Ct. 100, 51 L. Ed. 184; *New Mexico v. Railroad*, 203 U. S. 38, 27 Sup. Ct. 1, 51 L. Ed. 78; *Foppiano v. Speed*, 199 U. S. 501, 26 Sup. Ct. 138, 50 L. Ed. 288; *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 25 Sup. Ct. 686, 48 L. Ed. 1059; *Field v. Company*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538; *Pennsylvania R. R. v. Knight*, 192 U. S. 21, 24 Sup. Ct. 202, 48 L. Ed. 325; *Pennsylvania R. R. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268; *Wisconsin, etc., Ry. v. Powers*, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. Ed. 229; *Aller v. Company*, 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 134; *Louisville, etc., R. R. v. Eubank*, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. Ed.

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416; *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346; *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819); and "the argument in each case leads to the conclusion that if the thing itself is in pursuance of a valid state law, its enforcement will not be stayed because it may incidentally affect interstate commerce" (*Southern, etc., Co. v. Railroad*, 127 Ga. 626, 56 S. E. 742, 9 L. R. A. [N. S.] 853, 119 Am. St. Rep. 356). The test, therefore, to determine whether the attachment in this case was forbidden by the commerce clause is to inquire (1) whether the statute which authorized it is a valid state law and, if it is, (2) whether the attachment of the car was a direct interference with interstate commerce. That the statute under which the attachment was made is a valid state law, enacted to enable creditors to collect their debts, and for no other or ulterior purpose, is not questioned. Hence the attachment of the car was not forbidden by the commerce clause of the federal Constitution; for it is obvious that seizing a car when it is not in use does not directly affect their intrastate or interstate commerce.

(2) The next question is as to the effect of section 5258 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3564), on the validity of the attachment. That section provides that "every railroad company in the United States * * * is hereby authorized to carry upon and over its road * * * freight and property on their way from any state to another state, * * * and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination." As this section has been construed, it gives railroads, no matter where they are incorporated, the right to engage in interstate business in all parts of the United States, and to become jointly interested with roads in other states, in the interstate business originating on their lines. *Cincinnati, etc., Ry. v. Commission*, 162 U. S. 184, 192, 16 Sup. Ct. 700, 40 L. Ed. 935. Consequently, when the defendants made their contract with the Boston & Maine Railroad they became jointly interested with that road in all the interstate business originating on either road, to be delivered to the other for purpose of carriage to its destination. When the defendants delivered the car in question to the Boston & Maine Railroad, they engaged in business in this state by their duly authorized agent—the Boston & Maine Railroad. There is no force, therefore, in their contention that the attachment is a direct interference with interstate commerce because it compels them to come into a state in which they are not doing business, for the purpose of defending this suit; for they were doing business here when the car was attached, and will continue to do business here as long as their contract with the Boston & Maine Railroad remains in force. If section 5258 compelled the defendants to send cars into this state, there would be force

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in their contention that it must be assumed Congress did not intend to compel them to follow cars all over the United States, in the defense of actions begun by attaching them. But as has been seen, section 5258 permits, but does not compel, the sending of cars by the defendants over other roads. Consequently the presumption is that Congress intended, in case they availed themselves of the provisions of the section and sent their cars into this state, that they should stand as well as they would, and no better than they would, if they were incorporated here, or if they were the owners or lessees of the Boston & Maine Railroad. Neither does the defendants' contention that delivering freight to a connecting carrier outside this state, to be hauled into it, is not doing business here, come to anything. Even if it is sound as an abstract legal proposition, it has no application to the facts of this case. As has been seen, the defendants were jointly interested with the Boston & Maine Railroad in the safe delivery of the contents of the attached car to the consignee at Greenland. Act June 29, 1906, c. 3591, 34 Stat. 591 (U. S. Comp. St. Supp. p. 892). Consequently they were doing business here in the same way every member of a partnership does business wherever any of his partners carry on the joint enterprise. But if it be conceded that the defendants are not doing business here, it is not a greater hardship to compel them to come here to defend this suit than it would be to send the plaintiff to New York to prosecute her claim against them.

If, therefore, the attachment in this case is forbidden by section 5258, the reason for it is not because the defendants have no place of business in this state, but because they were engaged in interstate commerce, and used the car in question in that branch of their business; for, as has been seen, the section permits, but does not compel, them to engage in that traffic. *Kentucky, etc., Co. v. Railroad (C. C.)* 37 Fed. 567, 625, 2 L. R. A. 289; *Cincinnati, etc., Ry. v. Commission*, 162 U. S. 184, 192, 16 Sup. Ct. 700, 40 L. Ed. 935. Consequently there can be no presumption that Congress intended, in case the defendants accepted the provisions of the interstate commerce act, to exempt their cars from the operation of the laws of the states into which they were sent, when they would not be so exempted if they owned the roads over which the cars were sent, or if they hauled the cars over those roads with their own engines. *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Ratterman v. Company*, 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311; *Massachusetts v. Company*, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; *Western Union Tel. Co. v. Gottlieb*, 190 U. S. 413, 23 Sup. Ct. 730, 47 L.

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Ed. 1116; *Central Stockyards v. Railway*, 192 U. S. 568, 24 Sup. Ct. 339, 48 L. Ed. 565.

Since this is so, the same test should be applied to determine the validity of the attachment, in so far as section 5258 is concerned, as would be applied if the car were owned by the Boston & Maine Railroad, 20 Harv. Law Rev. 319, 320. As has already been stated, that test is to inquire whether the interference is direct or merely incidental. *Maine v. Railway*, 142 U. S. 217, 12 Sup. Ct. 121, 35 L. Ed. 994. That this is the proper test will be apparent from an examination of any one of the different lines of cases which decide when a particular act constitutes an illegal interference with interstate commerce. Take, for example, the decisions relating to taxation. An examination of the cases shows that the test applied to determine the validity of a tax is not to inquire where the owner of the property resides or does business, but whether the tax directly affects interstate commerce; for, although states cannot legally tax such commerce (*Galveston, etc., Ry. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031), they may tax railroads as going concerns (*Maine v. Railroad*, 142 U. S. 217, 12 Sup. Ct. 121, 35 L. Ed. 994). Cars employed within the borders of a state may be taxed as capital employed there, notwithstanding they are used in interstate traffic, and their owners neither reside nor have places of business in the state. *New York Central R. R. v. Miller*, 202 U. S. 584, 26 Sup. Ct. 714, 50 L. Ed. 1155; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613.

(3) The attachment, therefore, created a valid lien on the car in favor of the plaintiff unless the making of such an attachment is forbidden by the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]). Sections 1, 6, 8, 9, and 10 of the act provide that it shall apply to all steam railroads engaged in interstate commerce, either over their own roads, or by virtue of the provisions of section 5258 of the Revised Statutes of the United States that railroads shall make and post rates and not change them without notice, and that one injured by a railroad's failure to comply with the provisions of the act shall have a civil remedy against the offending corporation, and also the right to enter a complaint with the interstate commerce commission. Sections 2, 3, 4, 5, and 7 forbid the railroads to which the act applies to make special rates or pooling agreements; to give preferences to either persons or places; to charge more for a short haul than for a long haul in the same direction; or to combine to prevent the continuous carriage of goods. Sections 11 to 24 create the commission, impose its duties, and prescribe its mode of procedure. It is clear from this synopsis of the act that it was not intended to enable railroads engaged in interstate commerce to void payment of their just debts, but to compel them to carry for all on equal terms and

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for a fair price, without unnecessary delay and without giving undue preference to persons or places, and to prevent railroads which engage in the business, under the provisions of section 5258, from transshipping car load lots of freight at connecting points. *Cincinnati, etc., Ry. v. Commission*, 162 U. S. 184, 187, 16 Sup. Ct. 700, 40 L. Ed. 935.

Is the attachment of freight cars which are not in actual use forbidden by the act? In other words, is a statute which permits their attachment in conflict with the provisions of the act? It seems clear that it is not. Such a statute is not open to the objection that it tends to promote the evils at which the interstate commerce act is aimed, or that it directly, or indirectly, tends to defeat any of the purposes Congress had in view when the legislation was enacted. If our statute permitted the attachment of cars in transit, or even when they are in use, there would be some foundation for the contention that it is calculated to produce a direct interference with interstate commerce; but, as it does not permit the attachment of cars which are in use, it is not open to that objection.

Case discharged. All concurred.

ATCHISON, T. & S. F. RY. CO. v. STATE *et al.*

(Supreme Court of Oklahoma, Feb. 9, 1909).

[100 Pac. Rep. 11.]

Carriers—Regulation—Maintenance of Public Service “Facilities”—“Conveniences.”—The telephone is an indispensable aid in the conduct of the business of a common carrier at any center of population, and has become a necessity, both within the rule of the common law, as well as by the provisions of section 18, art. 9 (section 222, Bunn’s Ed.; Snyder’s Ed. p. 238) of the Constitution of Oklahoma.

Carriers—Regulation—Maintenance of Public Service Facilities.—With only one railroad station in a town having one telephone exchange, and an inland town about six miles distant with about 300 population having a telephone exchange, said town receiving all of its freight by the way of said station and a telephone installed and maintained in said station, connected with both exchanges, it appearing that the installing and maintaining of such telephone would be to the convenience of the patrons of said railroad station, the order of the Corporation Commission requiring such telephone to be installed and maintained in said station will not be disturbed in this court.

Carriers—Regulation—Presumptions in Favor of.—*Prima facie* just, reasonable, and correct, in section 22, art. 9 (section 235, Bunn’s Ed.; Snyder’s Ed. p. 259) of the Constitution, is a presumption arising upon the finding of the Corporation Commission that the order based upon

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such facts is presumed on appeal in this court to be just, reasonable, and correct, subject to be overcome or rebutted by the facts in the record, as weighed and found by this court in reviewing the same.

(Syllabus by the Court.)

Appeal from the Corporation Commission.

Petition by the State and others before the Corporation Commission, against the Atchison, Topeka & Santa Fe Railway Company. From the order entered against the Railway Company, it appeals. Affirmed.

See, also, 100 Pac. 16.

On the 8th day of May, A. D. 1908, the patrons of the Blackburn-Skedee Telephone Company petitioned the Corporation Commission to require the Atchison, Topeka & Santa Fe Railway Company to install and maintain a telephone in its station or depot at Skedee, Okl. Said railway company, hereinafter referred to as appellant, was notified of the filing of said petition and the setting of the matter for hearing on the 23d day of July, A. D. 1908. On said date, appellant appeared through its attorney, and the petitioners appeared through the Assistant Attorney General of the state. The proof at said hearing showed that there was a telephone exchange at Skedee, and also one at Blackburn, which is an inland town, six miles from Skedee, a railway station on the line of appellant; that, if a telephone was installed and maintained in the railway station at Skedee, it would be for the material convenience of the citizens of Blackburn, in the way of transacting business with said railway station in ascertaining when there was freight at said station, in order that they might send a freight wagon or conveyance for same; that there was an average of at least one wagon load of freight hauled from said station to the town of Blackburn each day of the year, frequently there being a dozen wagon loads per day, and that it was for the convenience of the people to have a means of ascertaining when their freight reached said station, in order that they might be advised as to when to send a conveyance after it; that without such telephone it worked a serious inconvenience in having to wait until they were notified by mail by the station agent, which would occasion a delay of about 24 hours, or sometimes result in paying demurrage; that frequently, when they would approximate the time when the freight would reach the station from the place of consignment and send a conveyance after it, they would be disappointed; that the station in Skedee was about three or four blocks from the main part of the business portion of said town, to whom a telephone in the station would be a convenience; that the charge per month for installing and maintaining a business telephone in said station was \$2; that mail went from Skedee to Blackburn only once per day; that the telephone company furnished free service for its exchange members over

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its line from Blackburn to Skedee, and *vice versa*; that Blackburn has a population of about 300; that it would be convenient for the residents of Skedee, in order to be notified as to when the trains were on time or when their freight had arrived, etc.; that there is only one railroad running into the town of Skedee; that it has been the custom of the railway agent at Skedee, when freight is received at that station billed to Blackburn, to notify the consignee by mail, by means of a postal card; that the exchange operator at Skedee notifies the exchange operator at Blackburn when the trains are late, and when they are on time.

On the 25th day of August, A. D. 1908, the Commission entered a final order in said cause, the main body of which is in words and figures, as follows:

"On the 9th day of May, 1908, the citizens of Skedee filed a complaint with the Corporation Commission, asking that the defendant be required to place a telephone in its depot at the town of Skedee, that the public may have the use thereof and the convenience it affords in transacting business with the defendant.

"On the 23d day of July, 1908, the case was heard by the Commission, and evidence having been introduced by the complainants and the defendant, after a due consideration of the same, the Commission finds that a telephone in the depot at Skedee is a necessary convenience to the people of Skedee and vicinity, and that the conditions are similar to most all depots in the state of Oklahoma where there is a telephone exchange maintained in the town.

"The Commission further finds from the evidence that at the town of Skedee, there is operated a small telephone exchange, also at Blackburn, an inland town, of about three hundred people, there is a small telephone exchange, and that the two towns are connected by a toll line with free service to the subscribers of each exchange, and that there are also other rural lines in the vicinity; that the depot at Skedee is about three or four blocks from the business section of the town, and that, in addition to the freight delivered to the people of Skedee and vicinity, the town of Blackburn, and probably other inland towns, receive their freight there. The evidence further shows that by the use of the telephone it avoids delays to those having rural telephone lines in waiting for mail, inasmuch as many people living six or seven miles in the country, who have gone to the expense of equipping themselves with rural telephones, could not receive any communication through the post office of the arrival of freight without making a trip to the post office. This is a great inconvenience, and unnecessary expense under the telephonic system of communication, in the busy season of the year. By the use of the telephone at depots, in informing the telephone central office of the time of the arrival of passenger trains, the

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general public in the town in communication with the exchange can ascertain the lateness of the train, and thereby avoid the annoyance and the exposure of standing around depots in great crowds, with a constant string of questions to the agent, thereby impeding the efficiency of his service.

"The Commission is of the opinion that it is the duty of the defendant to furnish a means of communication with the public according to the modern usages and customs. If the defendant should place a deaf and dumb person in charge of the station at Skedee, it could not be contended that this was adequate service, and inasmuch as all business, such as inquiring as to the time of trains, the arrival of freight, rates, and various other questions, can be, and usually is, transmitted over the phone, we see no reason why the same means should not be extended and become a part of the service between the railroad companies and their patrons and customers.

"Our conclusion on this point is strengthened by the fact that railroads at most all competitive points have found it necessary to install telephone service in their stations. If this service is necessary at competitive points and the railroad is willing to pay for the same, we see no reason why it should not be required to install the same service at other points similarly situated.

"The only objection the defendant makes to the installation of this service at Skedee is that it will entail a cost of \$2.00 per month, notwithstanding the fact in notifying all of its customers of the arrival of freight as required, if the same had to be done by mail, would entail a greater cost in postage than \$2.00 per month. While the contention of the defendant is that this service would be of no financial benefit to it, and would not assist in the transaction of its business, the Commission does not agree with these contentions, and is of the opinion that a telephone in depots does assist the defendant in the proper transaction of its business, and that this small item of \$2.00 per month should be paid by the defendant as it gladly pays its charge where it has competition and possibly does less business than at Skedee, and for the further reason that it is impracticable to depend upon a community to pay such expenses by contribution.

"The Commission is of the opinion, and holds, that a telephone in a depot where there is a telephone exchange maintained in the town is a necessary and essential part of the equipment to make the facilities and the service at any depot adequate for the reasonable use and necessities of the public.

"It is therefore ordered by the Corporation Commission that the defendant, the Atchison, Topeka & Santa Fe Railway Company, install and maintain a telephone station at its depot in the town of Skedee for the use of its agent in answering all inquiries of the public for which telephones are usually used, and that said telephone station shall be installed not later than the

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15th day of September, 1908, and maintained until further ordered by the Commission."

The following assignments of error are made by the appellant:

(1) That said Commission was without jurisdiction or authority to make the order entered in said case.

(2) That the said Commission erred in its opinion and judgment that it is the duty of this plaintiff in error to furnish a means of communication with the public according to modern usages and customs.

(3) That said commission erred in finding that it is the modern usage and custom to furnish means of communication with the public by railroad companies other than through their places of business, regularly established for the handling and transaction of business coming to them as a carrier, and particularly because there was no evidence whatever to sustain such a finding.

(4) The plaintiff in error further says that the findings of said Commission are erroneous wherein it finds that this defendant maintains telephone connections at all places where there is competition, because said finding is not true, and because there is no evidence to support it.

(5) That said Commission further erred in its finding that a telephone in the depot, where there is a telephone exchange in the town, is a necessary, essential part of equipment to make the facilities and services of any depot adequate for the benefit and interests of the public, because the said conclusion is not true as a matter of fact, and because the same is without evidence to support it.

(6) That said Commission erred in that part of its finding in making the following order: "It is therefore ordered by the Corporation Commission that the defendant, the Atchison, Topeka & Santa Fe Railway Company, install and maintain a telephone exchange at its depot in the town of Skedee for the use of its agent in answering all inquiries of the public for which telephones are usually used."

(7) That said Commission erred in directing that said station should be installed not later than the 15th day of September, 1908, and maintained until further order of the Commission.

(8) That said judgment and order are erroneous and void because this defendant is not engaged in the operation of a telephone or a line of telephones, and was made so as to operate for the special interest and benefit of telephone lines and telephone companies operating telephone lines in the state of Oklahoma.

(9) That said order imposes upon this plaintiff in error a duty not incumbent upon it as a common carrier, and amounts to requiring it to pay for service not required by law as a part of its duties as a common carrier, and imposes an additional burden upon it, which amounts to the taking of its property without due

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process of law under the fourteenth amendment of the Constitution of the United States.

(10) That said order is unreasonable, unnecessary and imposes a burden not contemplated by law or by the charter of this plaintiff in error, upon it, and thereby deprives it of its property without due process of law under the terms and provisions of the Constitution of the United States.

(11) That said order is general in its nature, and contemplates the installation of telephones at the stations of the plaintiff in error throughout the state, imposing a burden of more than \$2,500 annually upon the plaintiff in error, without any compensation therefrom, and that the burden thus imposed involves more than the sum of \$5,000.

(12) That under said order a burden is imposed upon plaintiff in error herein to its damage in more than the sum of \$5,000, and its property taken without due process of law in excess of said amount.

The appeal from this order is now properly before this court for determination.

Cottingham & Bledsoe, for appellant.

G. A. Henshaw, Asst. Atty. Gen., for appellee.

WILLIAMS, J. (after stating the facts as above). We will consider all the assignments of error under two propositions: (1) Had the Commission jurisdiction to make the order complained of? (2) If so, was the order reasonable and just?

1. Section 18, art. 9 (section 222, Bunn's Ed.; Snyder's Ed. p. 238), of the Constitution of Oklahoma provides: "The Commission shall from time to time prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service facilities and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements the Commission may, from time to time, alter or amend."

Freund on Police Power, in section 395, p. 411, says: "Within the scope defined by the charter, the business must be provided with facilities adequate to render the service offered to the public and which may be expected to be called for under ordinary conditions, though not sufficient to cope with an unusual pressure or emergency. * * *"

There can be no question but that the Legislature of the state, unless otherwise in the organic charter thereof restricted, has the power to require railroad companies, in the carrying on of their business as common carriers, to afford every reasonable facility and convenience for the transaction of such business with the patronizing public. The only limitation upon such

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power is that the duty imposed must relate to the matter which is within the domain and property subject of police regulation, and that it is reasonable. *Railroad Commissioners v. P. & O. Cent. R. R. Co.*, 63 Me. 269, 18 Am. Rep. 208; 4 Bl. Com. 162; *Commonwealth v. Alger*, 7 Cush. (Mass.) 53; *Thorpe v. Rutland & Burlington R. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625; *Lake Shore & Mich. So. Ry. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; *Southern Ry. Co. v. State*, 125 Ga. 289, 54 S. E. 160, 114 Am. St. Rep. 203; *State v. Redmon*, 134 Wis. 89, 114 N. W. 137, 14 L. R. A. (N. S.) 229; *Cooley's Const. Lim.* (7th Ed.), p. 844, and authorities cited in footnotes 1 and 2; 23 Am. & Eng. Ency. of Law, pp. 727, 728.

The sovereignty, expressing its will through the organic law, may confer such legislative authority upon the Corporation Commission. *Dreyer v. Illinois*, 187 U. S. 71, 23 Sup. Ct. 28, 47 L. Ed. 79; *Winchester & Strasburg R. R. Co. et al. v. Commonwealth*, 106 Va. 264, 55 S. E. 692; *Prentis et al. v. Atlantic Coast Line Co. et al.* (decided by the Supreme Court of the United States November 30, 1908, but not yet officially reported) 29 Sup. Ct. 67, 53 L. Ed. —.

If a telephone is a facility or convenience, as contemplated in said section 18, art. 9, the Commission had jurisdiction to determine whether or not it would be just and reasonable to require the same to be installed in appellant's station at Skedee. Hence it becomes necessary to determine whether or not a telephone is a facility or convenience.

In the case of *Hopkins v. United States*, 171 U. S. 591, 19 Sup. Ct. 45, 43 L. Ed. 296, the court said: "The commission agent, in selling the cattle for their owner, simply aids him in finding a market; but the facilities thus afforded the owner by the agent are not of such a nature as to thereby make that agent an individual engaged in interstate commerce, nor is his agreement with others engaged in the same business, as to the terms upon which they would provide these facilities, rendered void as a contract in restraint of that commerce. Even all agreements among buyers of cattle from other states are not necessarily a violation of this act, although such agreements may undoubtedly effect that commerce.

"The charges of the agent on account of his services are nothing more than charges for aids or facilities furnished the owner, whereby his object may be the more easily and readily accomplished. Charges for the transportation of cattle between different states are charges for doing something which is one of the forms of, and which itself constitutes, interstate trade or commerce, while charges or commissions based upon services performed for the owner in effecting the sale of the cattle are not directly connected with, as forming a part of, interstate commerce, although the cattle may have come from another state.

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Charges for services of this nature do not immediately touch or act upon, nor do they directly affect, the subject of the transportation. Indirectly, and as an incident, they may enhance the cost to the owner of the cattle in finding a market, or they may add to the price paid by the purchaser, but they are not charges which are directly laid upon the article in the course of transportation, and which are charges upon the commerce itself. They are charges for the facilities given or provided the owner in the course of the movement from the home situs of the article to the place and point where it is sold.

"The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. Charges for such facilities as we have already mentioned are not a restraint upon that trade, although the total cost of marketing a subject thereof may be thereby increased. Charges for facilities furnished have been held not a regulation of commerce, even when made for service rendered, or as compensation for benefits conferred."

In the case of *People's Telephone Co. v. Eastern Railway Co. of Minnesota et al.* (decided by the Railroad Commission of Wisconsin, October 12, 1908), it is said: "The telephone is at present an indispensable aid in the conduct of almost every business and calling of any importance. No railroad company could manage its business at any center of population economically or satisfactorily without telephonic connections between its stations, warehouses, and grounds and the mercantile, manufacturing, and other places of business in the community. The duty of furnishing the public with adequate telephonic service for the purpose of transacting business with the railroad has been self-imposed in many instances by reason of usage and necessity. It has therefore become a necessary facility in such cases for the proper discharge of the transportation business of the railway company, within the rule of the common law as well as in contemplation of the express legislative enactments. While a carrier may select the agencies by which to serve the public, it may not select an agency exclusively which for any reason is incapable of fully discharging the duty of the carrier to the public. The right of the selection of facilities is limited by the condition that those selected are adequate and efficient for the purposes required."

In said opinion it is further said: "As we view the situation, the only complaint against the adequacy of the telephone service afforded the public by the respondents that we may lawfully consider in this proceeding is that relating to the connections with the city ticket office on the Tower Avenue and the general freight offices. There was no contention on the part of respondents that the convenience of the public would not be subserved by the installation of petitioner's telephone in such offices.

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It seems to have been tacitly admitted that the services at such offices are inadequate to meet the requirements of the railroads in dealing with the shippers and in transacting the general passenger business, because of the inability to communicate by telephone with the subscribers of petitioner's exchange. The evidence shows that about one-half of the telephones in use at Superior have no connection with the respondent's offices, buildings, or grounds, excepting only the Union Depot and elevator 'S.' Under the circumstances disclosed by the evidence, we conclude and determine that the telephone facilities in the respondent's city ticket office and general freight office at Superior are inadequate for the satisfactory performance of their duty to the public as common carriers of freight and passengers, and do further find that in order to provide adequate telephonic connections with said office it will be necessary for the respondents to install, in each of said offices, one of the petitioner's telephones connected with its exchanges in the city of Superior."

We conclude that a telephone is a facility and convenience within the purview of section 18, art. 9, *supra*.

2. In the case of Interstate Commerce Commission v. Louisville & Nashville R. R. Co. (C. C.), 102 Fed. 709, Toulmin, District Judge, said: "But the findings of fact in the report of the Commission are made by law *prima facie* evidence of the matters therein stated, and the conclusions of the Commission based upon such findings are presumed to be well founded and correct, and they will not be set aside unless error clearly appears. The record does not clearly show that the Commission's findings and conclusions on this branch of the case are erroneous, are not in accordance with the law and the evidence, and the court should not overrule or in any manner interfere with them."

In the case of B. & N. Ry. Co. v. Dey, 82 Iowa, 342, 48 N. W. 106, 12 L. R. A. 436, 31 Am. St. Rep. 477, the court said: "We conclude that according to the obvious construction of the two statutes read together, that joint rates are not absolute, but are *prima facie* evidence only of their reasonableness and justice."

In the case of Louisville & Nashville R. Co. v. Interstate Ry. Co., 107 Va. 225, 57 S. E. 655, the court said: "It must be remembered that under section 156, cl. 'f,' of the Constitution of Virginia of 1902 (Code 1904, p. cclv), the finding of the Commission is *prima facie* correct, and all presumptions are therefore in favor of its action, and the burden is on the appellant to show that the wide discretion with which that tribunal is invested has been erroneously exercised."

In the case of Newport News & Old Point Ry. & Electric Co. v. Hampton Roads Ry. & Electric Co., 102 Va. 850, 47 S. E. 858, the court said: "As to the necessity and propriety of the crossing in question, authorized by the Corporation Commission, it

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need only be said that, in addition to the provision contained in the Constitution (article 12, § 156, cl. 'f'), that such rulings of the Commission are to be regarded as *prima facie* just, reasonable, and correct; and that the provisions of the statute referred to, there is nothing whatever in the record that overcomes, in the slightest degree, the presumption arising upon the finding of the Corporation Commission that the crossings authorized are necessary and proper to be made; nor is there anything in the record to sustain that contention that they are unnecessary and would be unsafe. On the contrary, the expert engineer, in his report, says as to the crossings, when constructed in accordance with the methods and specification furnished him by the chairman of the Corporation Commission: 'I consider them all necessary, and all reasonably safe, considering the conditions to be met. I would make no suggestions as to changes, additions, or safeguards. I believe that while these complicated crossings would retard the schedules of both roads, and will necessitate slow and careful running down Mellen street by both companies, they are not, with proper care and diligence on the part of both companies, associated with particular danger to passengers or to the public.' The right of the appellee to cross the tracks of appellant is not in question. It is the manner of crossing, not for the benefit of the railroads, but for the benefit of the public. The object of creating the state corporation commissions was to protect the public rights by regulating public utilities."

In the case of *Standard Oil Co. v. Commonwealth*, 104 Va. 688, 52 S. E. 391, the court said: "We have, however, no doubt of the correctness of the construction placed upon section 37 (Code Va. 1904, p. 2214), by the State Corporation Commission. If we entertained doubt merely, our hesitation would have to be solved in favor of the state, as the Constitution requires us to regard the action of the Corporation Commission as *prima facie* correct. Const. § 156, cl. 'f.'"

We have quoted at length from the foregoing decisions where orders of commissions were reviewed, where it was provided by law that such order so to be regarded *prima facie* correct, just, or reasonable. And it would not be amiss further to see how the term "*prima facie*" has been regarded when applied to evidence in the trial of a case.

In the case of *Boykin v. State*, 34 Ark. 445, Mr. Justice Eakin, in delivering the opinion of the court, said: "Possession of property recently stolen, without reasonable explanation of that possession, is evidence of guilt to go to the jury for their consideration. In this sense, it is *prima facie* evidence, but not in the sense that it is such evidence as must compel the jury to a conviction, unless it be rebutted. It would have been better to have modified the instruction complained of, so as to impress upon the jury the idea that the evidence went to them

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for their consideration, under all the circumstances, to be weighed as tending to show guilt, but not imperatively imposing upon the jury the duty of conviction, unless rebutted."

In the case of Union Central Life Insurance Co. v. Caldwell, 68 Ark. 519, 58 S. W. 359, Mr. Justice Wood, in delivering the opinion of the court, said: "Proof of the giving of a promissory note by one person to another, without anything else appearing, is *prima facie* evidence of an accounting and settlement of all demands between the parties, and that the maker at the date of the note was indebted to the payee upon such settlement to the amount of such note; but this is a mere presumption, which may be repelled by proofs of the consideration of such note, and the occasion for and circumstances attending the giving of same."

In the connection that the term "*prima facie*" is used in section 22, art. 9, *supra*, it is not contemplated that any additional evidence should be considered by the Supreme Court on review, unless within the discretion of said court the cause should be remanded for further investigation. If no additional testimony is to be considered on appeal in the Supreme Court, reviewing the same in the same capacity as a legislative body, as held by the Supreme Court of the United States in the case of *Prentis et al. v. Atlantic Coast Line Co. et al.*, *supra*, what is the effect of being "regarded as *prima facie* just, reasonable, and correct?" It simply means that, in considering the testimony and the record upon which the order was based, the presumption arises in the Supreme Court that the order thereon made is to be regarded as *prima facie* just reasonable, and correct, such presumption subject to be overcome by evidence that may be in the record that clearly rebuts same.

Such presumption arising in favor of the order, while a strong one, is not one of a conclusive character. It will give way to a fair exhibition of the contravailing evidence in the record. The presumption given by this provision in favor of the Commission's order belongs to that class of *prima facie* orders or presumptions that are rebuttable, and will yield to the legitimate recitals of the record or the probative force of the evidence in the record. It casts upon the appellant the burden of making it clearly appear to the reviewing body that the order made by the Commission is erroneous. The appellant cannot with hope of success ask the revising tribunal to overthrow the findings of the Commission upon vague inferences or remote possibilities. It will fail unless it overcomes the presumption by making error manifest. Elliott's Appellate Procedure, § 711.

The only question in this record as to telephone facilities to be furnished by the railroad company pertains to such as are necessary to a proper discharge of its duties as a common carrier. It is not necessary to determine the distinction between the acts of a public service corporation when acting in its public capacity and

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when in its private capacity, for the acts complained of upon which this order is based relate solely to that of a public service corporation in its public capacity.

The evidence in the record neither rebuts nor overcomes the presumption in favor of the justness, reasonableness, and correctness of the Commission's order. In fact, the great weight of it sustains it. The order of the Commission is accordingly affirmed. All the Justices concur.

STATE *ex rel.* NORTHERN PAC. RY. CO. v. RAILROAD COMMISSION OF WASHINGTON *et al.*

(Supreme Court of Washington, April 6, 1909.)

[100 Pac. Rep. 987.]

Carriers—Rates—Change by Railroad Commission—Validity.—An order of the Railroad Commission, changing freight rates on commodities, is void, where no complaint has been made against the existing rates, and no hearing has been had thereon.

Appeal from Superior Court, Thurston County; O. V. LINN, Judge.

Writ of review by the State of Washington, on the relation of the Northern Pacific Railway Company, to review an order of the Railroad Commission of Washington. From an order annulling its order, the commission and its members, individually, appeal. Affirmed.

John D. Atkinson, J. B. Alexander, L. B. Knickerbocker, and E. C. Macdonald, for appellants.

B. S. Grosscup and Geo. T. Reid, for respondent.

MOUNT, J. This appeal is taken by the Railroad Commission from an order of the superior court of Thurston county, adjudging an order of the Railroad Commission, establishing a terminal rate on hay, oats, barley, and mill feed from points on the line of the Northern Pacific Railway Company to Bellingham, Aberdeen, Hoquiam, and South Bend, null and void. In May, 1907, a complaint was filed by the Railroad Commission against respondent and other railway companies, charging that certain rates were unreasonable and excessive. A citation was issued and served upon all the companies named in the complaint. All appeared and answered. Evidence was taken by the commission on many questions, and final findings of facts were made, and an order followed fixing certain joint rates on wheat and potatoes from certain zones to certain points in the state, and ordering certain track concessions, and fixing the rate on hay, oats, barley,

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and mill feed shipped over the line of the Northern Pacific Railway Company from eastern Washington points to points on Gray's Harbor, South Bend, Bellingham, and other branch lines in western Washington, the same as the rate charged to Kalama. The Northern Pacific Railway Company thereupon obtained a writ of review from the superior court Thurston county to review this finding and order of the Railroad Commission relating to the rate on hay, oats, barley, and mill feed. The record was certified to the superior court, and, upon a hearing, that court found that the order of the Railroad Commission, fixing the rate on hay, oats, barley, and mill feed, was void. This appeal is prosecuted by the Railroad Commission from that part of the order.

We find nothing in the complaint of the Railroad Commission which can justify the order of the commission on the commodities named. The only place where hay, oats, barley, and mill feed are mentioned in the complaint is in paragraph 24 thereof, and it is there stated that a joint rate exists on hay, oats, barley, and mill feed from eastern Washington to Seattle and Tacoma, for a continuous haul from points contiguous and equidistant from Seattle and Tacoma; that wheat bears the same classification as those commodities, and that the exclusion of wheat from such joint rate is unreasonable. Paragraph 25 of the complaint reads as follows: "That the towns of Aberdeen and Hoquiam, in Chehalis county, on Gray's Harbor are flourishing towns, being distant from each other five miles, more or less, and have a joint population exceeding 20,000 people, and are growing and increasing in population with great rapidity. That there are good shipping facilities at such points and large shipping interests, and said points contribute largely to the revenue of the Northern Pacific Railway Company. That South Bend, on Willapa Harbor, in Pacific county, is a prosperous city, and contributes largely to the revenue of the Northern Pacific Railway Company. That the city of Bellingham, in Whatcom county, is a city having a population exceeding 25,000 people, and is on the line of the Great Northern Railway Company, the Northern Pacific Railway Company, and the Bellingham Bay & British Columbia Railroad Company. That each of the towns and cities mentioned in this paragraph are desirous of establishing flouring mills, but by reason of their being compelled to pay, in addition to the terminal rates to Seattle or Tacoma, the local rate from Seattle or Tacoma to such towns and cities, they are prohibited from establishing at such points flouring mills, to the great detriment of the cities and the inhabitants thereof. That each of said cities on all eastern interstate shipments is recognized as a terminal city, and is accorded the same rates that are accorded Tacoma and Seattle by the Northern Pacific Railway Company, and Bellingham is accorded the same rates by the Great Northern Railway Company. That in addition thereto the Great Northern Railway

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Company accords to the city of Bellingham the same rates on all shipments of grain originating on its main line east of the Cascade Tunnel as are accorded Seattle. That the Northern Pacific Railway Company has refused and still refuses to accord to the cities of South Bend, Aberdeen, Hoquiam, and Bellingham terminal rates on grain consigned from points in eastern Washington, but charges the terminal rate to Seattle or Tacoma, and then the local from there to the point designated, and that such rule, regulation, and rate is unreasonable and discriminatory against the points named. And the Great Northern Railway Company refuses to accord the city of Bellingham terminal rates on grain and cereals originating on its branch lines and off of its main line, this discriminating against the city of Bellingham, and that the rates charged to Seattle and Tacoma over the defendant roads would be and are a sufficiently remunerative rate and charge to be made for transporting freight to South Bend, Aberdeen, Hoquiam, and Bellingham, whether said rate be joint or otherwise."

The paragraphs of the prayer of the complaint relating to the subject under consideration state that notice be given to the railway companies of the time and place of hearing, to the end that orders may be entered establishing a joint rate on wheat from eastern Washington points to points on Puget Sound, Gray's Harbor, and Willapa Harbor. We find nothing in the complaint which indicates that there was any complaint about the rates on hay, oats, barley, and mill feed, or that there would be any hearing or any investigation of the rate on these commodities between points in eastern Washington and points on the western Washington branch lines of the Northern Pacific Railway Company. The most that can be claimed of paragraphs 24 and 25 of the complaint is that the allegations there would justify an order fixing a joint terminal rate on wheat from eastern Washington points to Aberdeen, Hoquiam, South Bend, and Bellingham. But the commission on that point found as follows: "As to that portion of the complaint asking that a joint terminal rate be extended to points on Gray's Harbor, Willapa Harbor, and Bellingham Bay, the commission feel that by reason of the additional haul it would not be justified in extending an order to such points." In the case of *State ex rel. Great Northern Ry. Co. v. Railroad Commission*, 47 Wash. 627, 92 Pac. 457, we held that the commission was authorized to fix rates only upon complaint made and after a full hearing. As we have seen above, no complaint was made against the existing rates on hay, oats, barley, and mill feed to Gray's Harbor points, and no hearing was or could have been had thereon, and the commission was not authorized to make an order therein changing such rates.

The order of the superior court was therefore right, and it is affirmed.

FULLERTON, CHADWICK, GOSE, DUNBAR, CROW, PARKER, and MORRIS, JJ., concur.

WABASH R. CO. *v.* UNITED STATES.

ELGIN, J. & E. RY. CO. *v.* SAME.

(Circuit Court of Appeals, Seventh Circuit, February 3, 1909.)

[168 Fed. Rep. 1.]

Commerce—Interstate Commerce—Safety Appliance Act.*—The amendment of March 2, 1903 (32 Stat. 943, c. 976 [U. S. Comp. St. Supp. 1907, p. 885]), to the safety appliance act applies to all cars and trains operated by a railroad carrier of interstate commerce over an interstate highway, irrespective of whether they are operated between points situated in the same state, or whether they are empty, or whether the traffic carried is intrastate traffic, and is constitutional.

Railroads—Interstate Commerce—Safety Appliance Act.—A penal statute, or one in derogation of the common law, should not be hedged in to less than the legislative intent, if that is clearly revealed by the act as a whole. From the title, and from every part of the safety appliance acts, it is indisputable that the purpose was to promote the safety of interstate passengers and freight, and to protect the lives and limbs of railroad employees while engaged in the work of interstate transportation.

Commerce—Safety Appliance Acts—Cars Subject to Restrictions.*—If a car is set apart for carrying intrastate traffic exclusively, but if it is not confined to intrastate trains on an intrastate line, the fact that while it is laden with intrastate traffic it is hauled in connection with interstate cars on an interstate line requires it to be equipped with automatic couplers and grab-irons, in compliance with the federal safety appliance acts.

Evidence—Expert Evidence.—An expert trainman may be asked, at the trial of a case under the safety appliance acts, as to the condition of a car coupler in question, and as to what was necessary in order to operate that coupler, as the mode of operation of automatic coupling mechanism and the effect of various conditions thereof are proper subjects for expert testimony.

(Syllabus by the Court.)

Words and Phrases—"Used."—The word "used" in Safety Appliance Act March 2, 1893, requiring common carriers to equip any car used in moving interstate traffic with automatic couplers, applies to all cars and trains operated by a railroad carrier of interstate commerce over an interstate highway, irrespective of whether they are operated between points situated in the same state, or whether they are empty, or whether the traffic carried is interstate traffic.

*For the authorities in this series on the subject of the application of automatic coupler acts, see foot-note appended to *United States v. Colorado & N. W. R. Co.* (C. C. A.), 27 R. R. R. 758, 50 Am. & Eng. R. Cas., N. S., 758; *Missouri Pac. Ry. Co. v. Brinkmeier* (Kan.), 27 R. R. R. 441, 50 Am. & Eng. R. Cas., N. S., 441; *Schlemmer v. Buffalo, etc., Ry. Co.* (U. S.), 26 R. R. R. 190, 49 Am. & Eng. R. Cas., N. S., 190.

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In Error to the District Court of the United States for the Southern Division of the Southern District of Illinois.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

These cases arise under the safety appliance acts. The first, second, and fourth sections of Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), are as follows:

"Section 1. That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel break and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

"Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

"Sec. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

In the first section of Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), it was provided: "That the provisions and requirements of the act" of March 2, 1893, "shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements * * * relating to train brakes, automatic couplers, grab-irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, * * * and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith."

In the Wabash case the only question is the sufficiency of the petition. The averments in substance were that the Wabash Company was an interstate common carrier, owning and operating an interstate railroad, and engaged in transporting thereover

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commodities in interstate traffic; that on a day named it hauled on its line of railroad a car that was not equipped with automatic couplers; that the car was one "regularly used in the movement of interstate traffic," but at the time in question was empty. As against the demurrer to this petition it stands admitted that the defective car was not a part of an interstate train, was not itself being moved on an interstate journey, and was not exclusively devoted to the carriage of commodities in interstate traffic. Contentions are presented that the car was not within section 2 of the act of 1893, and that if, by reason of the declaratory and interpretative act of 1903, this car be held to be included, the legislation would be in excess of the powers of Congress to regulate commerce.

In the Elgin, Joliet & Eastern case, besides the same matter of pleading, the question is presented by the evidence "whether a car, merely in the same train with other cars that are carrying interstate commerce, is by the fact alone of being in such a train, within the provisions of the act." Some minor points are urged, the facts in relation to which are indicated in the opinion.

In Case No. 1,461:

N. S. Brown and McAnulty & Allen, for plaintiff in error.

William A. Northcott, U. S. Atty., *Henry A. Converse*, Asst. U. S. Atty., and *Philip J. Doherty* and *Luther M. Walter*, Sp. Asst. U. S. Attys.

In Case No. 1,473:

Kemper K. Knapp, *R. W. Campbell*, *William Duff Haynie*, and *William Beye*, for plaintiff in error.

Edwin W. Sims, U. S. Atty., *Henry A. Parkin*, Asst. U. S. Atty., and *Philip J. Doherty* and *Luther M. Walter*, Sp. Asst. U. S. Attys.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). Do the words in the second section of the act of 1893, "any car used in moving interstate traffic," mean that a car is subject to the statute only during the time it is actually employed in moving interstate traffic, or that every car is within the act if it is customarily or repeatedly employed in such movements? Both meanings are within the dictionary definitions of "used," and, if regard were paid only to the rule that a penal statute should be strictly constructed, the narrower meaning might be taken. But a penal statute, or one in derogation of the common law, should not be hedged in to less than the legislative intent if that is clearly revealed by the act as a whole. From the title and from every part of the act we think it is indisputable that the purpose was to promote the safety of interstate passengers and freight and to protect the lives and limbs of railroad employees while engaged

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in the work of interstate transportation. The risks incurred in coupling and uncoupling are more imminent on switching tracks, where trains are made up and distributed, and where empty cars are set out at freight houses or factory platforms to be loaded, than on the main lines. It is not reasonable to suppose that Congress intended to cover only the smaller part of the dangers; and since the language employed is entirely consistent with the larger meaning, section 2 of the act of 1893 should be held to forbid an interstate carrier from hauling or using on its line any car that is customarily or generally employed in moving interstate traffic, and that is not equipped with automatic couplers, even though at the particular time the car be empty or be moving interstate traffic.

This interpretation follows, we believe, from the decision in *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363. A dining car that had been in regular service between San Francisco, Cal., and Ogden, Utah, was dropped by an east-bound train at Promontory, Utah, to be attached to the next west-bound train. While the car was standing empty on a siding, a freight brakeman was ordered to couple it to an engine for the purpose of turning it around preparatory to its being picked up by the west-bound train. The car was not equipped with automatic couplers. "Confessedly this dining car," the Supreme Court said, "was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic and so within the law."

The Elgin, Joliet & Eastern record involves the further inquiry: If a car is set apart for carrying intrastate traffic exclusively, but if it is not confined to intrastate trains on an intrastate line, does the fact that while it is laden with intrastate traffic it is hauled in connection with interstate cars on an interstate line require it to be equipped with automatic couplers and grab-irons? While the usual canons of construction might not lead to holding such a car to be within section 2 and 4 of the act of 1893, it seems to us beyond doubt that the rule of interpretation prescribed in section 1 of the act of 1903 forecloses the question. The provisions relating to automatic couplers, etc., "shall be held to apply" to all cars used on any railroad engaged in interstate commerce and to all other cars used in connection therewith.

But these interpretations, it is insisted, carry the legislation beyond the powers of Congress. The answer, in outline, is this: When the Declaration of Independence ripened into fact, the several states could have taken their separate places in the family of nations as absolutely sovereign powers, and the commerce among them would have been on the same footing as commerce "with foreign nations" and "with the Indian tribes." On aban-

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doing their "firm league of friendship" and adopting the Constitution, the states divested themselves of the power to regulate interstate commerce as completely as they did of the power to regulate foreign commerce, and transferred to the nation in equal terms the power to regulate both. To the extent that there is a difference between the power of Congress over interstate commerce and over foreign commerce, it comes not from any difference in the grants, but from the fact that other provisions of the Constitution which may limit the exercise of the power over interstate commerce may have no application to foreign commerce. *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *The Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999; *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; *Champion v. Ames*, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492; *Employer's Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. But though the power conferred by the commerce clause is absolute, except as limited by other parts of the Constitution, yet, inasmuch as that instrument is one of "enumeration rather than of definition," the questions always remain in a given case: Is the subject-matter interstate commerce? Is the purported regulation in fact a regulation? And is the regulation obnoxious to any of the restraining clauses of the Constitution?

In response to these questions no generalizations in advance of the long processes of judicial inclusion and exclusion should be attempted, and the particular answers should be understood as limited to the facts of the cases. That transportation is commerce and that those who do the business of carrying passengers and freight across state lines are engaged in interstate commerce are matters settled beyond question. *State Freight Tax Case*, 15 Wall. 232, 21 L. Ed. 146, and authorities *supra*. No restraining clauses are relied on by counsel to limit the face value of the commerce clause as applied to these cases. No doubt is suggested that the requirement of safety appliances on cars that are actually laden with interstate traffic is a regulation of interstate commerce. Now, if the same interstate carrier may haul on the same interstate highway cars that need not be equipped because though regularly used in interstate traffic they are empty at the time (the *Wabash* case) and also cars that need not be equipped because they are laden with intrastate traffic exclusively (the *Elgin* case), the purpose of equipping the cars that are carrying interstate traffic would manifestly be largely impaired or destroyed; for in switching movements, in derailments, and in collisions, disaster would come to the interstate car quite irrespective of the character of the other cars involved. Therefore Congress, under the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers" of regulating interstate commerce, had the right to make the laws in question; and

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they are paramount, of course, to all laws of the states. This result, which we deem sound in reason, is indirectly sustained, we believe, by the Employer's Liability Cases, *supra*; for there the statute was overthrown only because an inseparable part of it was found to have no necessary or proper relation to the security of interstate transportation.

In the Elgin case it is insisted that, although the car in question was not furnished with equipment by which it could be uncoupled from the adjacent car "without the necessity of men going between the ends of the cars," the act was not violated because the adjacent car was equipped so that it could be uncoupled from the car in question in the prescribed manner. Under the act each car is a unit and must itself be completely equipped so that trainmen may go about their work without charging their memories with differences between cars.

An expert trainman, after describing the broken condition of a coupler, was asked:

"In the condition in which that coupler was on that end of the car at that time, what was necessary in order to operate the coupler?"

He answered:

"It would necessitate a man going between the ends of the cars and taking the part of the chain that was left with the coupler to operate that coupler."

The question was objected to on the ground that it called for a conclusion and invaded the province of the jury. In our judgment the mode of operation of automatic coupling mechanism and the effect of various conditions thereof were proper subjects for expert testimony.

By an oral stipulation in open court the Elgin Company admitted that "it is a common carrier engaged in interstate commerce." Under the assignment that the court erred in refusing to direct a verdict for defendant, contention is now made that there was no evidence to show that defendant was an interstate carrier at the times laid in the petition. That was not disclosed as one of the grounds of the motion. If it had been, defendant would have been compelled to amend the stipulation, or plaintiff would have introduced the evidence, to obviate the taking of which the stipulation had been made. As the point was not presented to and ruled on by the trial court, it is not available here.

The judgment in each case is affirmed.

WILSON v. PUGET SOUND ELECTRIC RY. CO.

(Supreme Court of Washington, April 12, 1909.)

[101 Pac. Rep. 50.]

Negligence—Negligence of Chauffeur as Imputable to Passenger.*—In determining the liability for the death of a passenger in an automobile in a collision with a street car, whether the chauffeur was negligent will not be considered, except as it may appear to touch the question of the independent negligence of the deceased, the doctrine of imputable negligence having been rejected by this court.

Street Railroads—Collision with Automobile—Contributory Negligence of Passenger Therein—Question for Jury.—Evidence held to present a question for the jury as to the contributory negligence of passenger in an automobile killed in a collision with a street car.

Negligence—Injury to Passenger in Vehicle—What Constitutes Contributory Negligence.*—Ordinarily where one rides in a vehicle with the driver, and is injured by the negligence of a third person, to which the negligence of the driver contributes, contributory negligence is not imputable to him unless he has, or is in a position to have and exercise, some control over the driver as to the matter wherein he is negligent.

Negligence—Passenger in Automobile Run for Hire—Liability for Negligence of Chauffeur.†—A passenger in an automobile run for hire is not liable for the negligence of a chauffeur unless he fails to exercise ordinary care by doing or failing to do something he ought to have done, or should not have done at the time, as an ordinarily prudent person.

Street Railroads—Collision with Automobile—Evidence of Excessive Speed of Car—Sufficiency.—Evidence in an action for the death of a passenger in an automobile killed in a collision with a street car held to show that the street car was running at a dangerous speed, much in excess of the speed limit prescribed by ordinance.

Street Railroads—Exceeding Speed Limit as Constituting Negligence.‡—For a street car to exceed the lawful speed limit is negligence of itself.

*For the authorities in this series on the subject of imputed negligence, see second foot-note appended to *Paducah Traction Co. v. Sine* (Ky.), 30 R. R. R. 755, 53 Am. & Eng. R. Cas., N. S., 755; first foot-note appended to *Wade v. Western Maryland R. Co.* (Pa.), 30 R. R. R. 238, 53 Am. & Eng. R. Cas., N. S., 238; third head-note of *Davis v. Chicago, etc., Ry. Co.* (C. C. A.), 30 R. R. R. 183, 53 Am. & Eng. R. Cas., N. S., 183.

†See first foot-note appended to *Liabraaten v. Minneapolis, etc., Ry. Co.* (Minn.), 30 R. R. R. 178, 53 Am. & Eng. R. Cas., N. S., 178.

‡See first foot-note appended to *Butler v. Rhode Island Co.* (R. I.), 28 R. R. R. 322, 51 Am. & Eng. R. Cas., N. S., 322; sixth head-note of *Ashley v. Kanawha Valley Traction Co.* (W. Va.), 26 R. R. R. 520, 49 Am. & Eng. R. Cas., N. S., 520.

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Judge.

Appeal from Superior Court, King County; R. B. Albertson, Action by Etta Wilson against the Puget Sound Electric Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 50 Wash. 596, 97 Pac. 727.

James B. Howe and Hugh A. Tait, for appellant.

Blaine, Tucker & Hyland and Robert C. Saunders, for respondent.

GOSE, J. The respondent, plaintiff below, brought this suit against the appellant to recover damages for personal injuries received by her husband, resulting in his death. The case was tried to a jury, terminating in a verdict and judgment against the appellant. From such judgment, this appeal is prosecuted.

The complaint, in substance, charges that on the 14th day of September, 1907, the respondent's husband became a passenger in an automobile run for hire, and was being conveyed therein from the city of Seattle to a point known as "The Meadows," some distance south of the city; that a car of the appellant, operated by electricity, through the negligence of the appellant's servants, ran into the automobile, overthrowing the same, and throwing the husband of the respondent out of the automobile, and upon the planking in the street at the point of contact with such force and violence as to produce injuries from which he died on the 27th day of October following. The appellant joined issue upon the question of its negligence, and pleaded affirmatively that the negligence of the respondent's husband contributed to his injury, and was the proximate cause thereof. This was denied by the reply. The undisputed evidence showed that the accident occurred on a planked street known as First Avenue South. The street at this point was about 36 feet in width. On either side of the street was a walk for pedestrians about four feet in width. On the outside of each walk there was a railing about three feet in height, and on the inside a riser, about eight by eight in dimensions, was spiked to the plank. This riser was the only barrier between the street and the walk. The appellant was operating a double-tracked electric railway over the street. The street was used generally by the public. There was not sufficient space for an ordinary vehicle to pass between cars on the tracks, or to pass between a car and the barrier. The street was practically level and straight for a fourth to a half a mile south from the point where the accident occurred. On the day of the accident a friend of the deceased invited him and others to go to The Meadows, and procured an automobile which was operated for hire to convey them thither. The route taken by the automobile was south along what is known as First Avenue South, the

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narrow planked street heretofore mentioned. The deceased sat on the front seat beside the driver. The machine followed the street car for some distance, when, owing to the dust and splinters thrown up by the car, the driver turned the machine onto the east track, and ran parallel with the car for about one-fourth of a mile. The outgoing car took the west track, and the incoming car the east track. When running parallel with the car, the machine ran along the east track.

There was a sharp conflict in the evidence as to the speed at which the machine and car were running. It was variously estimated by the witnesses at from 8 to 40 miles an hour. The driver of the machine, who was also its owner, testified that, before turning on to the east track, he asked the deceased "if the road was clear, * * * and he looked over and said it was, that there was not a car or anything in sight;" and he further said: "I could also see that it was; that there was nothing there in sight anywhere that I could see, and I drew out." He further said that he ran alongside the car for a fourth of a mile; that he then saw the north-bound car approaching him about 300 or 350 yards distant; that he could have seen the north-bound car a fourth of a mile; that he was then 30 feet in the lead of the south-bound car; that, upon seeing the approaching car, he increased the speed of the machine about 20 per cent. and took a diagonal course about 150 feet; that he was then running in front of the south-bound car about 15 to 25 feet in advance of it; that he ran on that track "a little distance" before he was struck; that he increased his speed and ran in front of the south-bound car because he did not think that he had time to drop behind it and avoid a collision with the north-bound car; that the north-bound car passed before his machine was struck by the south-bound car; that his machine was carried 80 feet by the car. It is conceded that the speed limit was 12 miles an hour. A passenger in the machine testified that the south-bound car was running 35 miles an hour; that the north-bound car was running about 30 miles an hour; that, when the driver started to turn in front of the south-bound car, the north-bound car was about 300 yards distant; that the driver turned in 12 or 15 feet ahead of the north-bound car; that the machine was fully straightened out in front of the car before it was struck; that the north-bound car could have been seen for a distance of a half mile. A witness on the south-bound car testified that the car was running very fast; that the car carried the machine 60 yards after striking it. Another witness said the car ran 75 or 100 yards after striking the machine; that the machine got in the car track 15 or 20 feet in front of the car. Still another witness said: "When I saw him (the driver), he was straightened out, and then the street car came on him so fast that it just crushed right into him." That the machine was traveling at the rate of

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20 miles an hour, and the car at the rate of 30 miles an hour. That the car ran 100 or 150 feet after it turned the machine over. That it dragged the machine 200 feet, and carried it some 30 feet before the machine turned over. A witness for the appellant said the car "stopped in about 100 to 125 feet from where the automobile had stopped and turned over." The appellant offered evidence tending to show that the car was running at from 8 to 25 miles an hour; that the machine turned in front of the car on a sharp curve from 2 to 35 feet ahead of the car; that the machine ran against the riser or guard rail, slackened speed, and was then struck by the car. The only evidence as to anything the deceased said or did was that, in response to an inquiry of the driver as to whether the north-bound track was clear, "he looked over and said that it was; * * * that there was not a car or anything in sight." The only instruction given the driver was the statement of one Van De Vanter, who hired him, to the effect that the party wanted to go to The Meadows, and that they had "plenty" of time. Under all the evidence the east track was clear when the machine took it. Assuming that the north-bound car could have been seen for half a mile if it was traveling at the same speed as the machine, it was not in sight when deceased looked. As we have said, the machine ran on the east track for a quarter of a mile, and then the north-bound car was from 300 to 350 yards distant.

Three errors are assigned: (1) That the court erred in denying appellant's motion for judgment at the close of the evidence; (2) that the court erred in refusing to direct a verdict for the appellant; (3) that the court erred in denying appellant's motion for a verdict notwithstanding the verdict. In legal effect the three assignments challenged the sufficiency of the evidence to support the verdict. The appellant argues that the respondent's decedent was guilty of contributory negligence which precluded her recovery. Under this head it urges (1) the chauffeur was grossly negligent; (2) under the circumstances the negligence of the chauffeur was imputable to respondent's decedent; and (3) that the evidence does not disclose any negligence on the part of the appellant. Whether the chauffeur was negligent we will not consider, except as it may appear to touch the question of the independent negligence of the deceased. The doctrine of imputable negligence has been rejected by this court. "Where one is simply an invited guest of a voluntary driver, we do not believe the latter should be held to be such an agent of the former that the driver's negligence should be imputed to the passenger when the passenger is without fault, and has no control over the driver or his team. Especially does this seem to be right when considered in relation to one innocent of negligence, where it appears that the accident would not have happened, even with the negligence of the driver contributing, but for the primary

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neglect of the defendant." *Shearer v. Town of Buckley*, 31 Wash. 370, 72 Pac. 76. We are content with the rule announced in this case. The question of imputable negligence was not pressed in the oral argument.

Touching the question of contributory negligence of the deceased, the general rule has been announced by this court in *Shearer v. Town of Buckley*, at page 376 of 31 Wash., at page 78 of 72 Pac., where it said: "Whether he was negligent and contributed to the injury was a question concerning which the minds of men might reasonably differ, and was for the jury to determine. *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. Rep. 799; *Steele v. Northern Pacific Ry. Co.*, 21 Wash. 287, 57 Pac. 820; *Traver v. Spokane St. Ry. Co.*, 25 Wash. 225, 65 Pac. 284; *Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114; *Burian v. Seattle Electric Co.*, 26 Wash. 606, 67 Pac. 214." The appellant urges, however, that there was an advisory or supervisory duty on the deceased under the rule announced in *Cable v. Spokane & Inland Empire R. Co.*, 50 Wash. 619, 97 Pac. 744. In this case Rufus Cable received injuries from which he died, and his daughter, a young woman 17 years of age, was seriously injured. The injury occurred at a crossing of an interurban electric railway. The father and daughter were attempting to cross the track with a horse and buggy. The doctrine of "stop, look, and listen" was applied to both father and daughter. It appears from the opinion that the father was driving the horse. We think the true general rule is announced in this case in the following language: "Ordinarily where one rides in a vehicle with the driver thereof and is injured by the negligence of a third person, to which negligence that of the driver contributes, the contributory negligence is not imputable to the passenger, unless said passenger has, or is in a position to have and exercise, some control over the driver with reference to the matter wherein he was negligent." We think it may be stated with the utmost safety that ordinarily two persons cannot drive or control the same horse, team, or vehicle at the same time. But, however the rule may be as to the duty of one who is not the driver when riding in a conveyance drawn by horses, the reason for the rule has no application to the instant case. No negligent act of the deceased, either of omission, or commission is disclosed by the evidence. He did nothing and said nothing except to answer a question asked him by the driver. It is a well-known fact that an automobile is an intricate machine, and one which requires skill to operate. The deceased had a right to assume that the driver was competent, that he knew the capacity of his machine, and that he would not put it in a perilous position. If the machine was running at 12 or 15 miles an hour, as testified by the driver, and the car at 8 miles an hour, as testified by the motorman, when the driver started to go onto the west track, the act would not

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have appeared hazardous to a reasonable man. If, however, the south-bound car was traveling at a speed of 40 miles an hour, and the north-bound car at 30 miles an hour, the situation was serious when the north-bound car was observed, and it would not appear to one who is not skilled in the operation of a machine how any advice from a passenger to the driver under such circumstances could aid the latter in any way. It would seem that any interference, or attempted assistance, on the part of the passenger, would have tended to disconcert rather than to aid the driver. The facts are therefore distinguishable from those in the Cable Case. A case very similar to this is *Chadbourn v. Springfield Street Ry. Co.*, 199 Mass. 574, 85 N. E. 737. In that case the plaintiff was riding as the invited guest of the driver of an automobile on a narrow bridge. Two street car tracks crossed the bridge in the center of the roadway, so that a vehicle could not pass between the car on either track and the guard rail of the bridge. The driver of the automobile, after following the car for a distance, turned to pass it on the left; it being impossible to pass it on the right. The machine was struck by the approaching car. At page 576 of 199 Mass., at page 738 of 85 N. E., the court say: "The question of the plaintiff's due care was for the jury. She seems to have conducted herself as an invited guest of the driver of an automobile or other vehicle naturally would do. She trusted him as to the running of the machine; that is, she did not attempt to interfere with his management of the automobile. In view of her inexperience and of what might have been found to be the skill and experience of the driver, the jury might well have thought that this was a wise course on her part. Nor was there any relation of agency between her and the driver such as of itself would affect her with negligence on his part. She had no right to control him. There was no mutuality in a common enterprise between them. It cannot be said as matter of law that she ought to have warned the driver against turning out from behind the car which he had been following, especially in view of the fact that he was turning both in the direction required by statute (Rev. Laws, c. 54, § 2) and in the only direction in which the width of the bridge afforded room for him to pass that car. And she had a right to rely somewhat on the acquaintance with the road which she might presume that he had. Accordingly we need not consider whether it can be said that Reed's conduct was as matter of law negligent. Even if this were so, the plaintiff's own due care was for the jury." Speaking to this question in *State v. Boston & M. R. Co.*, 80 Me. 445, 15 Atl. 39, it is said: "The plaintiff's case is fortified by another consideration. He neither drove nor as far as appears had any control of the team on which he was riding. It is reasonable to suppose that the owner carried him either for hire or gratuitously as a neighborly kindness. His position was not of

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the same degree of responsibility to the railroad as was that of the driver. He was a comparatively passive party. Not that he had no duty to perform. He could have asked the driver to stop the team, or he could have left it. But it would be natural, even though his fears were excited, that he should defer to some extent to the experience and discretion of the driver who was in the control of his own team; and before he had time to assert his own judgment against the driver's, or perhaps fully appreciate the situation, the inevitable event was upon him. We think this fact has considerable force in the combination of circumstances which weigh against the charge of contributory negligence." In *Louisville & N. R. Co. v. Molloy's Adm'x*, 122 Ky. 219, 91 S. W. 685, one Molloy hired one Aller, a livery man, to take him to Brownsville with a team. Molloy was killed while the team was crossing a railroad track. At page 231 of 122 Ky., at page 687 of 91 S. W., the court said: "Aller was a common carrier of passengers, and Molloy was no more chargeable with his negligence than he would have been for the negligence of the motorman if running on an electric car." In *Carr v. City of Easton*, 142 Pa. 139, 21 Atl. 822, a woman was injured by the upsetting of a sleigh in which she was riding caused by high embankments of snow and ice and by gutters on the track. At page 143 of 142 Pa., at page 823 of 21 Atl., it is said: "She was a woman, not shown to have any special knowledge of driving of horses or sleighs, who had trusted herself to the guidance of her brother-in-law and his friend; and we cannot say as matter of law that the danger was so apparent or so serious that she was called upon to exercise her own judgment in opposition to theirs. All these matters are for the jury to decide, upon their view of reasonable care and prudent conduct, under the circumstances shown by the evidence." See, also, *Louisville, N. & A. C. Ry. Co. v. Creek*, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 732; *Board of Com'rs v. Mutchler*, 137 Ind. 140, 36 N. E. 534; *Lake Shore & M. S. Ry. Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476; *Cunningham v. City of Thief River Falls*, 84 Minn. 21, 86 N. W. 763; *Denis v. Lewiston B. & B. St. Ry. Co. (Me.)*, 70 Atl. 1047; *Roedler v. Chicago, etc., R. Co.*, 129 Wis. 270, 109 N. W. 88; *Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex. 643, 11 S. W. 127. The applicable rule was very clearly stated to the jury by the learned trial judge in the following terms: "Now, briefly, you are to understand from these general charges that the husband of the plaintiff would not be liable for the negligence of the automobile driver if there was any, unless by his own failure to exercise ordinary care at the time he contributed to his injury by doing or failing to do something that he ought to have done or should not have done at the time as an ordinarily prudent person." It would certainly be an extreme case where the court would be warranted in announcing as a rule of law that a passenger in an automobile was required to warn, advise, or direct its

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driver, or to apply to such passenger the doctrine of "stop, look, and listen." We are impressed with the statement of the learned counsel of the respondent that ordinarily the only obligation on such passenger is to "sit tight."

There is abundant evidence tending to show that the appellant was running at a dangerous speed, much in excess of the speed limit prescribed by ordinance. Speaking upon this question, we said in *Engelker v. Seattle Electric Company*, 50 Wash. 196, 96 Pac. 1039: "To the doctrine that exceeding the lawful speed limit constitutes negligence the court has already subscribed in the *Traver Case* (*Traver v. Spokane Street Ry. Co.*, 25 Wash. 225, 65 Pac. 284). * * * We prefer to adhere to a doctrine that a thing which is done in violation of positive law is in itself negligence." We have no difficulty in arriving at the conclusion that there was abundant evidence to be submitted to the jury upon all the questions raised by the appellant.

The verdict being for \$2,500 was singularly modest, and the judgment will be affirmed.

FULLERTON, DUNBAR, MOUNT, CROW, and CHADWICK, JJ., concur.

LOUISVILLE RY. CO. v. HOLMES.

(Court of Appeals of Kentucky, April 15, 1909.)

[117 S. W. Rep. 953.]

Evidence—Weight and Sufficiency—Necessity of Preponderance of Evidence.—The rule that, where the evidence which would render defendant liable is no stronger than the evidence to the contrary, there could be no recovery, only applies where the deduction is to be made from circumstantial evidence, and does not apply where there is a mere discrepancy in the testimony of witnesses.

Street Railroads—Throwing Papers from Cars—Injuries to Third Persons—Negligence of Passenger.—A street car company is not liable for injuries to a person standing at a street corner waiting for a street car injured by the negligence of a passenger in gratuitously throwing a bundle of papers from car in the performance of a duty devolving on the car operatives.

Street Railroads—Injuries to Third Persons—Evidence.—In an action against a street car company for injuries to plaintiff caused by being struck by a bundle of papers negligently thrown from a passing car, evidence held insufficient to sustain a finding that the papers were thrown by the conductor, and not by a passenger.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"Not to be officially reported."

Action by Annie Holmes against the Louisville Railway Com-

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pany. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Fairleigh, Straus & Fairleigh and *Howard B. Lee*, for appellant.

Bennett H. Young, for appellee.

HOBSON, J. The street cars in Louisville deliver newspapers for the publishers; the papers being tied up in bundles which are thrown off as the cars pass the business places for which the papers are intended. The papers are marked to show to whom they go. While Mrs. Annie Holmes was standing at the corner of Twenty-Sixth street and Portland avenue on January 21, 1907, waiting for the east-bound car, a west-bound car passed, and a bundle of papers was thrown from it which struck her violently in the stomach, in the solar plexus region, inflicting serious injuries, to recover for which she brought this suit; and, a verdict and judgment having been rendered in her favor for the sum of \$4,000, the railway company appeals.

Her injury was, as she proves, so serious that the amount of the verdict was not excessive if the defendant is liable. It is insisted for it, however, that the court should have instructed the jury peremptorily to find for it, and that, if the case should have gone to the jury, the verdict is palpably against the evidence. The case turns on who threw the bundle of papers from the car. The defendant contends that the bundle of papers was thrown from the car by one of the passengers on it without the knowledge or authority of its agents in charge of the car. The plaintiff contends that the papers were thrown from the car by the conductor, and that the defendant is responsible although the papers were thrown from the car by the passenger. As to who threw the papers from the car only four witnesses were introduced, and all these were introduced by the plaintiff. The plaintiff's statement is as follows: "While we were standing there, a man threw off a bundle of papers, and hit me in the stomach. -I did not see the bundle until I got ready to go into the car, and I stepped on it." This is her whole statement as to who threw off the bundle. She evidently was knocked out by it, and did not know who threw it off. J. H. Evans, the conductor of the car, testified that he was just coming out of the car near the back door, when J. G. Foster, a passenger on the car, threw the papers off; that Foster was employed by the B. F. Avery Plow Company, and was going home on the car; that he had nothing to do with the papers, and that he had not requested him to throw them off, and did not know that he intended to do so. Foster testified that he was only on the car going home; that he saw the papers were marked to be delivered at this point, and that he reached around in the back and got the bundle and pitched it out; that the conductor did not know he was going to throw it off, and

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said to him, "You ought to have let it alone"; that he answered, "I just pitched it off, and did not intend to hit anybody." He also testified that about a year before he had run as a conductor on the line, and knew that the papers were to be thrown off at the points indicated by the marks on them. The conductor said he went into the car to collect some fares, and, when they got to that point, had not got out, and Foster took the papers before he could get there, and threw the bundle off. Mrs. Mary Humley, who was standing with Mrs. Holmes on the corner, testified as follows: "While we were standing there waiting for the car, the car going in west, why he threw a bundle of papers out from the back end of the car it seemed to me. He was a street car man. He had on a uniform and cap, and threw it out from the back end of the car, and it struck her across the breast, and she went to fall and I caught her, and she turned blind and sick, and there was a couple of men come up and asked if she was hurt, and I told them, 'Yes,' and I assisted her home and went out as far as one square of her house, and I got off the car and went home. My daughter was sick and I went home, and I went over in a couple of days, and she was bad and in bed. Q. What sort of a uniform did this man have on that threw this paper? A. He had on a blue uniform. Q. Are you familiar with the uniforms of street car conductors? A. Yes, sir; pretty familiar. Q. Did he have on one of those? A. Yes, sir. Q. Show us how he threw that paper? A. He just kept swinging it in this way two or three times, and then he sent it, and it struck her across there very hard." The defendant insists that as the plaintiff introduced all four of the witnesses, and none of them are impeached, the rule should be applied that, where the evidence in favor of a state of case in which the defendant would be liable is no stronger than the evidence in favor of a state of case in which it is not liable, there can be no recovery. But this rule has no application. The rule is applied where the deduction is to be made from circumstantial evidence, and where there is no direct proof as to how the injury occurred. It does not apply where there is a discrepancy in the testimony of the witnesses. In such a state of case it is for the jury to say which of the witnesses correctly stated the facts. We therefore conclude that the court properly refused to instruct the jury peremptorily to find for the defendant.

It remains to determine whether the verdict is palpably against the evidence. On the trial the conductor, Evans, was not in the service of the railway company, and Foster had left the service of the Avery Plow Company and was in the service of the railway company. Mrs. Humley was a disinterested witness, and, none of the witnesses being in any wise impeached, we should not interfere merely because the jury believed one witness rather than the other two if there was nothing more in the case. Mrs.

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Humley might be mistaken, and still swear truthfully to all she states, believing it to be true. But neither Evans nor Foster can be mistaken in what they state. The facts are either as stated by them or they have willfully sworn falsely. They cannot be mistaken as to the facts they state. Mrs. Holmes was hurt, and they knew it. As to who had thrown the papers off, they could not then be mistaken. On the contrary, Mrs. Humley, who was standing on the sidewalk, and who had nothing to call her attention to who had thrown the papers off until her friend was struck, might naturally think that the conductor who appeared at the back door just after her friend was struck was the man who had thrown the papers. She was naturally excited from the injury received by her friend, and she might very reasonably be mistaken as to which of the two men had thrown the papers off, and it will be observed she says, "It seemed to me," etc. The cause of action arises, not from the throwing off of the papers, but from the negligent manner in which it was done. If the man who threw them off had noticed what he was doing, or had looked before he threw the papers out, he would not have hit Mrs. Holmes. Her injury was due to the fact that he threw them out without looking. If the conductor did this, the defendant is liable, but if a passenger on the car, acting on his own volition and without authority, did so, the defendant is not liable for his negligence in not looking; for it had not authorized him to act for it. He is liable for his own negligence in so throwing off the papers, but he could not by volunteering to throw them off impose a liability on the defendant for his negligence in throwing them off without looking. In view of all the facts, we think the ends of substantial justice require that a new trial should be granted.

Judgment reversed, and cause remanded for a new trial.

EL DORADO & B. RY. CO. v. KNOX.

(Supreme Court of Arkansas, March 22, 1909.)

[117 S. W. Rep. 779.]

Continuance—Grounds—Absence of Counsel.—A motion for a continuance stated that defendant's regular counsel, who prepared the case for trial, was unavoidably absent, attending another trial, and that its present counsel did not know who defendant's witnesses were, or how to reach them, but it did not appear that any witnesses were, in fact, summoned and there was no showing of any effort to get witnesses, it being known two days before trial that the regular attorney would be absent, when other attorneys were employed. Held, that the motion failed to show the exercise of diligence in preparing for trial, so that the motion for continuance was properly denied.

Railroads—Injury to Animals—Actions—Negligence—Weight of Evidence.*—Under Kirby's Dig. § 6773, making railroads responsible for all damage done to property in operating trains, the killing of a dog by a train was prima facie evidence of negligence by the railroad, and an instruction that, if a railroad killed a dog by the operation of its trains, the killing is presumed to have been negligent, and the burden was on the company to show that it was not negligent, was not prejudicial error.

Railroads—Injury to Animals—Actions—Weight of Evidence—Value of Animal.—That a dog killed by defendant railroad was not assessed did not prove that it had no value, especially in view of undisputed evidence that it was valuable.

Railroads—Injury to Animals—Actions—Venue—"Other Stock."—The statute requiring actions against a railroad for damages for killing animals, such as horses, mules, cattle, or other stock, to be brought in the county where the killing occurred, does not apply to actions for killing dogs; "other stock" only including such animals as those mentioned, so that it was not necessary to prove that a dog was killed in the county where the action was brought.

Appeal from Circuit Court, Union County; Geo. W. Hays, Judge.

Action by J. A. Knox against the El Dorado & Bastrop Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

*For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to running trains against dogs, see first foot-note appended to *Cook v. Southern Ry. Co.* (S. Car.), 26 R. R. R. 730, 49 Am. & Eng. R. Cas., N. S., 730; *Harper v. St. Paul City Ry. Co.* (Minn.), 25 R. R. R. 668, 48 Am. & Eng. R. Cas., N. S., 668; *Central of Georgia Ry. Co. v. Martin* (Ala.), 25 R. R. R. 299, 48 Am. & Eng. R. Cas., N. S., 299.

El Dorado & B. Ry. Co. v. Knox

E. B. Kinsworthy and Lewis Rhoton, for appellant.
Pat McNalley and R. G. Harper, for appellee.

BATTLE, J. J. A. Knox brought an action against the El Dorado & Bastrop Railway Company to recover damages caused by the killing of a certain dog, the property of plaintiff. In a trial before a jury a verdict was returned in favor of plaintiff for \$25, and judgment was rendered accordingly, to reverse which an appeal was taken to this court.

When the action was called for trial on the 8th day of April, 1908, the defendant filed a motion for continuance as follows:

"Comes the defendant herein, and moves the court to continue this cause to the next term of this court, and for cause states: That Hon. C. C. Hamby, its regular attorney, who has prepared for trial this cause, and who tries all cases at El Dorado, Ark., is absent from this court, in attendance upon the circuit court at Mt. Ida, Ark., and is there engaged in the trial of a large and important case for the St. Louis, Iron Mountain & Southern Railway Company; that C. C. Hamby is the only attorney for the defendant who is prepared to try this case; and that his absence is unavoidable, and that he would have to be absent was unknown to defendant until the 6th day of this month, when it spoke to the other counsel for the purpose of getting this continuance, and that the counsel it now has is not familiar with the case, does not know who the witnesses for the defendant are, and does not know how to reach them to get them here."

The court properly overruled the motion. The motion does not show any effort made to get witnesses. It seems none were summoned. It was known two days before the trial that the regular attorney would not be present, and other attorneys were employed. It fails to show the exercise of diligence in getting ready for trial.

On the 12th of November, 1907, the dog of plaintiff was found dead on the railroad of the defendant, between Dollar Junction and Felsenthal. He was cut in two. His body was scattered upon the track. The blood was fresh, and appeared to have been shed recently. The passenger train of the defendant had passed over the track where the dog was killed about an hour before he was found. No other train was seen to pass there about that time. The dog was a valuable dog. One witness testified that his reasonable cash market value was \$50.

The court instructed the jury over the objections of the defendant as follows:

"The jury are instructed that if they find from a preponderance of the testimony in this case that the defendant railway company, by the operation of its trains, killed the dog in controversy, the property of the plaintiff, the killing is presumed to have been negligently done, and the burden is upon the defendant to show that the killing of said dog was not through its negligence.

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"You are further instructed that, if you find for the plaintiff in this case, you shall assess his damages at such amount as you may believe from the evidence that he is entitled to recover for the killing of said dog, not to exceed \$25, the amount sued for."

The following instruction was requested by the defendant, and refused by the court:

"The jury are instructed that if they find from the evidence in this case that the dog in controversy was not assessed, and that the plaintiff was the owner of said dog on the first Monday in June, 1907, then you will find for the defendant."

This court has held that dogs are personal property, for the negligent killing of which a railway company is liable. *St. L. S. R. Co. v. Stanfield*, 63 Ark. 643, 40 S. W. 126, 37 L. R. A. 659; *St. Louis, I. M. & Sou. R. Co. v. Philpot*, 72 Ark. 23, 77 S. W. 901.

Section 6773, Kirby's Dig., provides: "All railroads which are now or may be hereafter built and operated in whole or in part in this state shall be responsible for all damages to persons and property done or caused by the running of trains in this state." Under this statute the killing of the dog by the running of a train was *prima facie* evidence of negligence on the part of the railroad company. *St. Louis, Iron M. & Sou. R. Co. v. Neeley*, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616, and cases cited.

There was no prejudicial error committed in giving the instruction at the request of plaintiff. The court properly refused to give the instructions asked for by appellant. The fact that the dog was not assessed did not prove that the dog was of no value, especially when the undisputed evidence shows that the dog was valuable.

Appellant contends that the statute requires that actions of this kind should be brought in the county in which the animal was killed; that, the action in this case having been brought in Union County, it was necessary to prove that the dog in question was killed in that county. But the statute referred to does not include dogs. It does say that actions for damages sustained by the killing or wounding certain animals by railroad trains should be brought in the county where the killing or wounding occurred. It describes the animals referred to to be such as horses, mules, cattle, or other stock. "Other stock" means such as horses, mules, and cattle, and this does not include dogs. *Hempstead County v. Harkness*, 73 Ark. 600, 602, 84 S. W. 799. It was therefore not necessary to prove that the dog was killed in Union county.

The evidence in the case shows that the market value of the dog was at least \$25. There is none to the contrary. The evidence was sufficient to sustain the verdict.

Judgment affirmed.

GRIFFITH *et al.* v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, April 9, 1909.)

[64 S. E. Rep. 222.]

Railroads—Killing Stock—Liability.—In an action against a railroad company for killing stock on the track during a dense fog, an instruction that the jury must decide what was due care in running a train under the conditions, including the presence of a dense fog, emphasized the necessity of caution in running trains in dense fog, and was not prejudicial to plaintiff.

Railroads—Killing Stock—Liability.*—Where the stock law is in force, a railroad is not required to use the same care and caution as in localities where such law is not in force.

Railroads — Killing Stock — Actions — Presumptions — Burden of Proof.†—That a railroad company killed stock on the track raises a presumption of negligence against the company, and where it, denying negligence and assuming the burden of proving due care, offers evidence overcoming the burden placed on it by the presumption, the jury cannot rest their verdict on the presumption alone, but must rest their verdict on the preponderance of the entire evidence.

Appeal from Common Pleas Circuit Court of Charleston County; R. W. Memminger, Judge.

Action by John W. Griffith and another, copartners, under the firm name of "J. W. Griffith & Bro.," against the Atlantic Coast Line Railroad Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

St. Julien Grimke and Legare, Holman & Baker, for appellants.

T. M. Mordecai, for respondent.

WOODS, J. The plaintiffs, who were contractors engaged in the construction of the Charleston & Summerville Railroad, used in their work 34 mules, which at night were kept in one inclosure. On the night of April 24, 1906, the mules broke one of the bars of the inclosure, and 4 of them strayed on defendant's railroad track, where they were killed between 5 and 6 o'clock in the morning by a passenger train. This action was brought to recover damages for the loss. The defenses set up were: First, that defendant's agents in charge of the train exercised due care

*See foot-note appended to *Cumming v. Great Northern Ry. Co.* (N. Dak.), 25 R. R. R. 672, 48 Am. & Eng. R. Cas., N. S., 672; foot-note appended to *Sarja v. Great Northern Ry. Co.* (Minn.), 21 R. R. R. 615, 44 Am. & Eng. R. Cas., N. S., 615.

†See foot-notes appended to *Kennedy v. Chicago, B. & Q. Ry. Co.* (Neb.), 27 R. R. R. 497, 50 Am. & Eng. R. Cas., N. S., 497.

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in the running of it, but a dense fog made it impossible for them to see the mules, and that the accident was unavoidable on their part; and, second, that the loss of the mules was the result of plaintiffs' contributory negligence in keeping the mules in a small and insecure inclosure. On the trial of the issues thus made, the jury found a verdict for the defendant. The plaintiffs appeal, assigning several errors in the charge to the jury.

There is no foundation for the exception alleging error on the part of the circuit judge in assuming that the train was running in a fog. The charge on this subject went no further than a statement that the General Assembly had not laid down by statute a rule as to any rate of speed or other precautions that a railroad company should take to avoid accidents while in a fog, and that the jury must decide what would be due care in running a train under all the conditions, such as the presence of darkness or fog. The charge on this subject was rather favorable to the plaintiff than otherwise, for it emphasized the necessity of caution by the defendant of running in darkness or fog.

The second exception alleges error in the instruction: "That where the stock law is in force the defendant is not required to use the same care and caution as in localities where such law is not in force." The law which requires the fencing of live stock was in force at the place where the mules were killed. In *Harley v. Eutawville R. R. Co.*, 31 S. C. 151, 9 S. E. 782, where the same conditions existed, the court held the defendant was entitled to have an instruction in the precise words here used by the circuit judge. The case is reaffirmed, rather than overruled, by the subsequent case of *Davis v. F. C. & P. R. R. Co.*, 47 S. C. 390, 25 S. E. 224.

The last two exceptions complain of the following instruction: "The jury is instructed that, notwithstanding the presumption of negligence which arises from the fact that the stock has been killed by the railroad company, where all the facts are in evidence, including the fact that the stock law was in force at the place in question, they must find a verdict from the preponderance of the evidence as a whole, and cannot find a verdict against the defendant simply because of the presumption of negligence." The defendant contends that by this instruction the jury were misled as to which party had the burden of proof, and might have inferred from it that the burden of proof rested on the plaintiffs. In opening this charge the circuit judge had said: "Now the law is, as you have heard stated here, that when a man proves that he owns live stock, and that it was killed upon the track of a railroad company, the law raises the presumption of negligence as against the railroad company, and says that, nothing further appearing than that, and there is no showing to the contrary, no explanation on the part of the railroad company, then the man is entitled to recovery, but the law goes on and says that

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where the railroad company comes in and denies that there was any negligence on its part and explains the killing and overcomes the burden of negligence thrown upon it, explains it satisfactorily to the jury that the killing was unavoidable, and was caused through no negligence on their part, then the presumption is removed, and the party cannot recover because, as you see, his right to recovery is based upon the negligence of the railroad company, and if it is shown that there has been no negligence on the part of the railroad company, he cannot recover." When these instructions are considered together, the meaning seems obvious that the fact of killing live stock on the track raises a presumption of negligence against a railroad company; but when the railroad company, denying negligence, and assuming the burden of proving due care, offers evidence which tends to overcome the burden placed on it by the presumption of negligence, then the jury cannot rest their verdict on the presumption alone, but must consider not only the presumption, but all the evidence on the subject, and rest their verdict on the preponderance of the entire evidence. This was nothing more than an instruction that the presumption from the fact of killing live stock by a railroad train is not controlling and conclusive against the railroad company, where it offers evidence tending to overcome the presumption. That this is a correct statement of the law will not be doubted, and we think the jury could not have understood the charge to mean anything else.

The judgment of this court is that the judgment of the circuit court be affirmed.

FOLKMIRE v. MICHIGAN UNITED RYS. CO.

(Supreme Court of Michigan, June 7, 1909.)

[121 N. W. Rep. 811.]

Railroads—Crossing Accident—Dangerous Crossing—Safety Devices.*—An electric car in the country at a speed of 40 or 50 miles an hour over a crossing at which decedent was killed may be negligence or not according to the surrounding circumstances, but is not negligence per se.

Railroads—Crossing Accident—Dangerous Crossing—Safety Devices.—In an action for death at an electric railroad crossing in the country, whether defendant was negligent in maintaining a dangerous crossing without safety devices held for the jury.

Railroads—Crossing Accident—Contributory Negligence.†—Where decedent drove on an electric railway crossing in the country, without looking for a car by which she was struck and killed, which was in plain sight before her horse reached the place of danger, and she could easily have avoided the accident, she was guilty of contributory negligence, precluding a recovery for her death.

Error to Circuit Court, Calhoun County; Walter H. North, Judge.

Action by John F. Folkmire, administrator, etc., against the Michigan United Railways Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

Argued before OSTRANDER, HOOKER, MOORE, MCALVAY, and BROOKE, JJ.

Sanford W. Ladd, for appellant.

Jesse M. Hatch and *Duane C. Salisbury*, for appellee.

HOOKER, J. The plaintiff's wife was instantly killed by a

*For the authorities in this series on the question whether any rate of train speed at crossings in the country may be negligent, see foot-note of *Custer v. Baltimore & O. R. Co.* (Pa.), 9 R. R. R. 448, 32 Am. & Eng. R. Cas., N. S., 448, where all those preceding it are collected; first foot-note of *Gorton v. Harmon* (Mich.), 30 R. R. R. 204, 53 Am. & Eng. R. Cas., N. S., 204; last foot-note of *Schwartz v. Delaware, etc., R. Co.* (Pa.), 25 R. R. R. 10, 48 Am. & Eng. R. Cas., N. S., 10.

†For the authorities in this series on the question whether there can be a recovery for injuries inflicted by a train which the highway traveler should have discovered to be approaching before he made the attempt to cross the tracks, see first foot-note of *Stotler v. Chicago & A. Ry. Co.* (Mo.), 27 R. R. R. 765, 50 Am. & Eng. R. Cas., N. S., 765, where all those preceding it are collected; third foot-note of *Smith's Adm'r v. Norfolk & W. Ry. Co.* (Va.), 29 R. R. R. 715, 52 Am. & Eng. R. Cas., N. S., 715; second foot-note of *Riedel v. Wheeling Traction Co.* (W. Va.), 29 R. R. R. 768, 52 Am. & Eng. R. Cas., N. S., 768; fifth head-note of *Southern Ry. Co. v. Hansbrough Adm'r* (Va.), 28 R. R. R. 1, 51 Am. & Eng. R. Cas., N. S., 1.

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suburban car at a highway crossing. He has sued as administrator, alleging negligence on the part of the defendant. The negligence alleged consisted of (1) failure to give a signal or warning on approaching the highway; (2) running the car at a high and dangerous rate of speed; (3) maintaining a dangerous crossing at the point where the accident occurred; (4) maintaining a crossing without safety devices, such as watchman, gates, and a system of signals other than the whistle on the car. Plaintiff was given a verdict and judgment for \$6,000, and defendant has brought the case to this court by writ of error.

Should the court have directed a verdict for defendant upon the ground that defendant was not shown to have been negligent?

(a) Failure to Give Signal. In our opinion there was no evidence that the whistle was not blown for the crossing at the regular whistling post, and there was much testimony that it was blown. *Shufelt v. Railroad*, 96 Mich. 334, 55 N. W. 1013.

(b) High Rate of Speed. The evidence is undisputed that the car was running at a speed of 40 or 50 miles an hour. This was not *per se* negligence, but it does not follow that it was not negligent. That must depend on other considerations that will be discussed later.

(c) Maintaining a Dangerous Crossing. (d) Maintaining a Dangerous Crossing Without Safety Devices. The last two claims of negligence may be considered together. The crossing was made at a long curve of the railroad and in a cut. We judge from the photographs that the excavation was little, if any, wider than was necessary to accommodate the road and its cars. The highway which crossed at grade was not at right angles with the railroad, and the deceased was driving toward the approaching car, but there was no place from which the car could be seen until she reached a point but a few feet from the rail. The distance that it might then be seen as it came into sight around the curve was a matter in dispute, but 450 feet is the maximum distance shown. According to plaintiff's theory that the car was 300 or 350 feet from the crossing when it rounded the curve and became visible, running 50 miles an hour, there would be but six seconds before it would reach the crossing if not slowed down; while at 2 miles an hour—the rate that deceased is said to have been driving,—it would have taken her more than twice as long to cover the 40 or more feet which the jury might have found it necessary for her to drive to get far enough across to be out of danger.

Counsel say that we have decided that it is not negligence to drive a car at a high rate of speed in the country, citing the cases of *Robinson v. Railway Co.*, 79 Mich. 323, 44 N. W. 779, 19 Am. St. Rep. 174; *Shufelt v. Railway Co.*, 96 Mich. 329, 55 N. W. 1013; *Tobias v. Railway Co.*, 103 Mich. 339, 61 N. W. 514. These cases do hold that the exigencies of modern travel

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require rapid transit, and sustain the statement hereinbefore made that a steam car is not necessarily negligently run when a high rate of speed is attained, and that speed alone is not *per se* negligence. It does not follow that a rate of speed making it impossible to get off from a track in safety after it is possible to discover a car is not a negligent rate of speed, nor that it is not negligent to maintain a highway crossing, exceptionally dangerous, without some provision for preventing such accidents. It is true that the whistle and incessant ringing of the bell together with the noise accompanying a heavy train on a steam road has generally been deemed sufficient care without placing flagmen or electric bells on the crossings, but there are cases where the contrary has been held. Thus in the case of *Guggenheim v. L. S. Ry.*, 66 Mich. 158, 33 N. W. 166, it was said of an exceptionally dangerous crossing that, "While there was at the time of the accident no statute limiting the speed of the train over this crossing, yet the speed of such train must nevertheless be consistent with the degree of care and prudence required in good railroad management, and that such crossing must be approached and passed over with the care and prudence commensurate with the rate of speed attained, and the train managed and controlled with that degree of care and prudence required for the safety of the lives and property of the persons rightfully approaching and traveling over such crossing." In *Freeman v. Railway*, 74 Mich. 87, 41 N. W. 873 (3 L. R. A. 594), this claim was made that there could be no negligence in having no flagman where none had been ordered by the railroad commissioner, but we held that this was not conclusive, and sustained a charge that, "when common prudence required a flagman or his equivalent," such provision should be made, if the danger at the crossing was altogether exceptional, because of a situation, which rendered ordinary prudence on the part of a driver insufficient protection against injury. Again in *Willett v. M. C. R. R. Co.*, 114 Mich. 411, 72 N. W. 260, it was said that the jury should have been allowed to find negligence in not providing some method of giving notice of a train's approach, where view was wholly cut off by a string of freight cars standing upon a city siding. See, also, *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. An elaborate note upon this subject with a multitude of cases will be found in a note to *Cowen v. Dietrick* (Md.) 4 Am. & Eng. Ann. Cas. 294.

The facts of this case are such as to subject it to the test of this line of cases without invoking any distinctions that might perhaps be based upon the differences between steam and electric road and the laws pertaining to them. We think that the refusal of this request was justified by the proof. In thus holding we do not imply that the jury should have found negligence. It would depend upon what they found the evidence to be.

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2. Contributory Negligence. The undisputed evidence shows that the deceased had a docile horse, that she was familiar with the crossing and the method of running the cars, also that she was driving nearly west, while the cars came from a little north of west, directly toward and in front of her. She was facing it as it came around the curve. It is self-evident that the car must have been visible from her wagon as soon as she was visible to the witnesses on the car, whose testimony is the only evidence of what took place. The plaintiff called two of the six witnesses upon the car. * One was a Mr. Nichols, who sat in the fourth seat from the front end, on the left-hand side of the car. He saw the buggy before it was struck. The first that attracted his attention to the woman or buggy was when he saw the horse going on to the track. He was asked: "Could you see the woman at that time? A. Yes, sir; but I saw the horse first—or right at the same time. The first I saw that called my attention was seeing the horse on the track and as I saw the horse I heard the whistle." James Elliott, a deputy sheriff, sat in the smoking room at the rear end of the car. His attention was called to the sudden shock of the car, caused by the sudden application of the brakes, and this was followed in four or five seconds by the crash. He did not see the buggy before the accident. The defendant produced four witnesses who were on the car. One Raub, a passenger, sat in the third seat in the observation section on the left or north side of the car, and had a view of the track. The whistle was sounded for the crossing as the car rounded the curve, and he looked out, and saw the rig coming, saw the horse's head in the road coming up on the track. He thought his head was two rods from the north rail at the crossing point, and at the same time he saw the deceased apparently looking down. "She drove on till she got right on the track. Then she looked up till she seen it. Then she slapped the lines on the horse and tried to get across." The horse was walking. The whistle was blown again "pretty quick" after he saw the rig "about the same time" as near as he could remember. This was as they rounded the curve, and he placed the distance at 300 feet. He said that he would not swear positively that she was looking down, and could not tell which way she was looking, but it looked as though she was looking down, and that she first looked in the direction of the car almost at the time the car struck the buggy. Then she looked up and slapped the lines on the horse. Fred Barket, the motorman, said he whistled for the crossing at the "board" about 900 feet distant. After this, and about 400 feet from the crossing, he saw the horse walking, and he saw the woman after seeing the horse. He saw her when she first looked up and saw the car. She was then almost square across the track. "Q. And previous to that had you seen her looking toward the coming car to the West? A.

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Yes, sir. Q. Then what did she do? A. She struck the horse once or twice, then raised up and screamed, raised up as if intending to jump out. Q. Previous to that time when she did this, as you say, after she had gotten square on to the track, had she done anything out of the ordinary except to sit in the buggy and drive along in the ordinary way. A. No, sir." On cross-examination he said: "I was 400 feet away when I saw the horse according to my best judgment. And the horse was about fifteen feet from where she [the woman] was hit. I could not see her when I first saw the horse." Floyd Thompson was in the second observation seat. He saw the horse first, just as the car was rounding the bend. He judged him to be 10 or 15 feet from the track, and right afterwards, he saw deceased. Signals were previously given. The horse continued to walk until they were on the track. The lady saw the car when she was on the track. She looked up just as she got on the middle of the track, and tried to urge her horse forward. Did not see her look up before that. Frank Thompson was on the car. He saw the whole rig as the car went around the curve. The lady came on not looking to see that the car was coming, as it seemed to him, drove right on to the track, or the horse on the track—he could not say which—before she showed any signs of noticing the car. Then she slapped the horse with the reins, and then the car struck the buggy. This is all of the testimony given by eye-witnesses, and it is all consistent only with the theory that deceased was inattentive, and omitted to look for a car, which was in plain sight before her horse reached a place of danger, and when she could easily have avoided the accident. The case falls so plainly within the rule laid down in several of our own cases that we are compelled to say that the court erred in not directing a verdict for the defendant upon the ground of contributory negligence. The following cases are in point. In the early case of *L. S. v. Miller*, 25 Mich. 290, this question is elaborately discussed, holding that a railroad is a warning of danger, that, if either of the senses of hearing and seeing cannot be rendered available, the obligation to use the other is the stronger, and if one neglects to do this, and ventures blindly upon the track without any effort to ascertain whether a train is approaching, such conduct is of itself negligence, and should be so pronounced by courts as matter of law. See note to this case in which many other cases are cited. *Haas v. G. R. & I. Co.*, 47 Mich. 401, 11 N. W. 216, followed the case last cited; *Mynning v. Railroad*, 64 Mich. 93, 31 N. W. 147, 8 Am. St. Rep. 804; *Richfield v. M. C. Co.*, 110 Mich. 406, 68 N. W. 218; *Freeman v. Railroad Co.*, 74 Mich. 86, 41 N. W. 872, 3 L. R. A. 594; *Guta v. Railroad Co.*, 87 Mich. 291, 45 N. W. 821; *Graf v. Railroad Co.*, 94 Mich. 579, 54 N. W. 388; *Gardner v. Railroad Co.*, 97 Mich. 240, 56 N. W. 603; *Houghton v. C. & G. T.*, 99 Mich. 308.

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58 N. W. 314; *Braudy v. Detroit Co.*, 107 Mich. 100, 64 N. W. 1056; *Bannister v. L. S.*, 113 Mich. 530, 71 N. W. 861; *Tucker v. C. & G. T.*, 122 Mich. 149, 80 N. W. 984; *Proper v. L. S.*, 136 Mich. 352, 99 N. W. 283, and cases cited. *Kwiotkowski v. R. Co.*, 70 Mich. 551, 38 N. W. 463.

Plaintiff's counsel urge the rule that we must presume that this woman was not negligent under the rule stated in the following cases: *Mynning v. Railroad*, 64 Mich. 93, 31 N. W. 147, 8 Am. St. Rep. 804; *Kwiotkowski v. R. Co.*, 70 Mich. 551, 38 N. W. 463; *Adams v. Iron Cliffs Co.*, 78 Mich. 277, 44 N. W. 270, 18 Am. St. Rep. 441; *Grostick v. Railway*, 90 Mich. 608, 51 N. W. 667; *Underhill v. Railway*, 81 Mich. 45, 45 N. W. 508. See *C. & O. Ry. v. Steele*, 84 Fed. 93, 29 C. C. A. 81, and note. The difficulty is that overwhelming and undisputed evidence shows that she did not stop or even look after reaching a point where either would have done any good, but drove heedlessly upon the track, with the car in plain sight, but a short distance away.

We deem it unnecessary to discuss other questions as they may not arise, should the cause be tried again.

The judgment is reversed, and a new trial ordered.

ST. LOUIS & S. F. R. CO. v. GORMAN.

(Supreme Court of Kansas, March 6, 1909.)

[100 Pac. Rep. 647.]

Contracts—Agreement to Make Contract in Future—Effect.—An agreement to make a contract in the future is not binding unless all the terms and conditions are agreed upon, and nothing is left to future negotiations.

Carriers—Carriers of Live Stock—Actions for Damages—Questions for Jury.—Under the facts of this case, it cannot be said as a matter of law that a shipper of cattle bound himself by preliminary negotiations relating to the shipment to sign a special written contract limiting the carrier's common-law liability.

Carriers—Carriers of Live Stock—Limitation of Liability.—If preliminary negotiations relating to a shipment of cattle have not resulted in a valid agreement that it shall be made under a special written contract, the shipper may rightfully refuse to sign such a contract, although he knows the custom of the carrier to require written contracts in the course of a long experience as a shipper has always signed written contracts, and following the negotiations intended to sign a contract of the kind he had been using for the shipment in question.

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Carriers—Carriage of Live Stock—Limitation of Liability—Validity of Contract.*—A special written contract limiting a carrier's common-law liability which has been extorted from a shipper who rightfully declined to sign it by means of a refusal to transport cattle already in the carrier's possession, unless such a contract was signed, is voidable at the shipper's election.

Contracts—Duress—Ratification.—A party may not voluntarily act upon a contract which he has been wrongfully constrained to sign and voluntarily take the benefit of it, and then avoid it for duress. But conduct exhibited in apparent recognition of the contract while the pressure of the hardship which overcomes the mind continues will not amount to an affirmation; and, to constitute an affirmation, the conduct of the injured party must be such as to indicate an intention to condone the wrong, and a purpose to abide by the consequences.

Carriers—Carriage of Live Stock—Actions for Damages—Questions for Jury.—Under the facts of this case, it cannot be said as a matter of law that the acceptance and use of a return pass by a shipper of stock after the stock had been transported and delivered confirmed a voidable contract with the carrier under which the shipment was made, and which provided for such pass.

(Syllabus by the Court.)

Error from District Court, Bourbon County; WALTER L. SIMONS, Judge.

Action by Thomas Gorman against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. F. Evans and R. R. Vermilion, for plaintiff in error.

Keene & Gates, for defendant in error.

BURCH, J. The defendant is a common carrier, operating a line of railroad running northward through Godfrey, Ft. Scott, and Fulton to Kansas City, Mo. The plaintiff is a stockman who resides at Fulton, north of Ft. Scott, and who keeps cattle at Godfrey, south of Ft. Scott. The defendant has no office or agent at Godfrey. Desiring to ship several car loads of cattle from Godfrey to Kansas City, the plaintiff made a verbal agreement to do so with the defendant's agent at Fulton. The arrangement was that cars would be placed at Godfrey, which the plaintiff would load in time to be taken by a certain train, the plaintiff would go with the cattle to Ft. Scott, the defendant would have a shipping contract prepared and ready for signature when the train arrived there, and the plaintiff and his cattle would

*See extensive note, 28 R. R. R. 384, 51 Am. & Eng. R. Cas., N. S., 384; second head-note of *Cleveland, etc., Ry. Co. v. Louisville Tin & Stove Co. (Ky.)*, 30 R. R. R. 672, 53 Am. & Eng. R. Cas., N. S., 672; foot-note appended to *Harris v. Great Northern Ry. Co. (Wash.)*, 30 R. R. R. 266, 53 Am. & Eng. R. Cas., N. S., 266.

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go through to Kansas City on the train taking them from Godfrey. The defendant had been a regular shipper of cattle for years, knew it was the custom to require shippers to sign written contracts, and had always signed written contracts, but he had never scrutinized, and was not familiar with, their provisions. He did not discuss rates or terms with the agent at Fulton or the conditions of the contract which would be in waiting for him. He did not know what the terms would be, but he expected to be presented with, and intended to sign, just such a written contract as he had been in the habit of shipping under, when he reached Ft. Scott. The cattle were loaded and transported to Ft. Scott as contemplated. At Ft. Scott the defendant had no contract in readiness for signature, no agent at the station, and, after diligent effort, the plaintiff could find nobody with authority to bill his cattle. The train conductor could not take the cattle without proper papers, and the cars containing them were cut out of the train over the plaintiff's objection and protest, were placed on a side track, and the train proceeded to Kansas City without them. The day was hot and sultry, and for several hours the cattle were switched and bumped about the yards, frequently with much violence, or were left standing between lines of other cars so that they suffered greatly from heat, with the result that they were seriously injured.* The plaintiff followed them about, getting up those which were knocked down, and otherwise doing what he could to protect them. The plaintiff finally found an agent who made out a contract, and presented it for signature. The plaintiff was not apprised of its terms, was offered no choice of rates, and was given no option as to conditions of liability on the part of the defendant. He might have read the instrument, but did not. He recognized it as a railroad live stock contract like the kind he had been using, but he was not familiar with what it contained. He told the agent the condition the cattle were then in, and refused to sign. The agent refused to allow the cattle to be shipped unless the plaintiff signed the paper tendered. Having no alternative, the plaintiff affixed his signature so that he could get his cattle to market. A few hours afterward the cattle were placed in a train which took them to Kansas City. When placed on the market, one animal could not be sold, and five others were weighed back after sale because of broken ribs and bruises. The contract which the plaintiff signed required him to attend and unload his cattle at his own risk and expense. It contained provisions with which he did not comply, which were conditions precedent to the recovery of damages for the injuries sustained. It also provided for his transportation. He went to Kansas City on the train with the cattle, and at Kansas City surrendered the contract to the defendant and received a pass to his home, which he used. The plaintiff sued the defendant for damages,

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counting upon the common-law liability which attached to the delivery of the cattle to the defendant under the verbal arrangement with the agent at Fulton. The defendant answered, setting up the written contract and pleading noncompliance with its conditions. The plaintiff replied that the writing was signed under duress. The case was submitted on testimony showing the foregoing among other facts. The court instructed the jury respecting the common-law liability of the defendant in the absence of special contract and respecting its limited liability under the written contract, and submitted to the jury the question whether the written contract was signed with such freedom from constraint that it governed the rights of the parties. The defendant excepted, but made no request for other instructions. The jury found for the plaintiff, and the defendant prosecutes error.

The defendant argues that, when the written contract was signed, it superseded all oral negotiations, and fixed the rights of the parties. It is said that, when the plaintiff signed the contract, he did only what he intended to do from the beginning, and what he agreed to do at the beginning, and hence that the coercion of the agent at Ft. Scott can be given no legal effect. It is not necessary to cite authorities upon the proposition that if the plaintiff freely and voluntarily signed the contract—assuming it to be one which the law will permit—it measures the rights of the parties. The oral arrangement would be at an end, and the plaintiff would be in no position to avoid the force of the limitations placed upon the carrier's liability by the writing. It may be assumed that, if the plaintiff legally bound himself at Fulton to execute the precise contract which was presented to him at Ft. Scott, the claimed coercion was without legal influence. But, if the plaintiff rested under no legal obligation to sign that contract, he could abandon his original intention and refuse to do so; and, if the original intention to sign was rightfully abandoned, any subsequent assent to the terms of the contract would have to be obtained without coercion or it would not bind. In calling upon this court to declare that the plaintiff irrevocably bound himself to sign the very instrument he did sign, the defendant raises a question of fact which he should have asked to have submitted to the jury under proper instructions. There is no evidence that the defendant had a standard form of contract which it invariably used, and which therefore was in the plaintiff's mind. The contract upon which the defendant relies has the following heading: "St. Louis and San Francisco Railroad Company. Read this contract carefully, as numerous changes have been made." How long this form had been in use does not appear, and it cannot be said the plaintiff had any of its provisions in mind. True, the plaintiff recognized the contract as a railroad live stock contract like the ones he had been using, and such as he expected to sign, but, taking all of his evidence

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into consideration, a jury would have the right to find that his identification extended no further than to the genus. A man may recognize a trust deed or coupon bond as such and know nothing of its contents, and he may agree to execute such a bond and to secure it by such a deed without agreeing upon any single condition to be inserted in either. All the plaintiff said must be weighed to ascertain its true purport. Statement qualifies statement, and reconciliation is a jury function.

Except that the plaintiff identified this contract as like those he had previously used, which to the jury might have meant nothing, there is no evidence of usual stipulations or customary conditions with which the plaintiff should have been familiar from his previous experience and which should have been in mind; and, except as indicated, there is no evidence that this contract was of a regular, usual, or customary kind. The court is not inclined to declare as a matter of law that a shipper who delivers stock to a carrier for transportation with the understanding that a written contract will be signed intends or binds himself to submit to every condition the carrier may see fit to impose. Under these circumstances, the jury would have been justified in finding that the plaintiff simply agreed to agree upon a contract when he reached Ft. Scott; and it is elementary law that, unless an agreement to make a future contract be definite and certain upon all the subjects to be embraced, it is nugatory. "A contract between two persons, upon a valid consideration, that they will at some specified time in the future, at the election of one of them, enter into a particular contract, specifying its terms, is undoubtedly binding, and, upon a breach thereof, the party having the election or option may recover as damages what such particular contract to be entered into would have been worth to him, if made. But an agreement that they will in the future make such contract as they may then agree upon amounts to nothing. An agreement to enter into negotiations, and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action. There would be no way by which the court could determine what sort of a contract the negotiations would result in, no rule by which the court could ascertain whether any, or, if so, what, damages might follow a refusal to enter into such future contract. So, to be enforceable, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations. * * * Where a final contract fails to express some matter, as, for instance, a time of payment, the law may imply the intention of the parties, but, where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon." *Shepard v. Carpenter*, 54 Minn. 153, 55 N. W. 906. Such being the law and the state of

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the case, it cannot be said that the plaintiff rested under a legal duty to sign the writing in controversy. He was free to refuse to commit himself to any specific agreement. He did refuse, and the Fulton arrangement was then at an end so far as the execution of a shipping contract was concerned. The law required the defendant to accept the plaintiff's stock for transportation without obliging him to agree to sign a special contract, and without coercing him into signing a special contract. A special contract limiting the carrier's common-law liability must be freely and fairly made, or the shipper may repudiate it, and a refusal to transport stock unless the shipper signs a special contract destroys freedom of consent. "Such a contract, however, must be freely and fairly made with the railroad company—not exacted as a condition precedent of shipment. Railroad companies cannot arbitrarily fix any valuation on the property of the shipper or arbitrarily demand or exact the execution of a contract limiting the common-law liability. *K. P. Ry. Co. v. Nichols*, 9 Kan. 236, 12 Am. Rep. 494. If a railroad company has two rates for the transportation of goods or stock—one if the goods or stock are carried under the common-law liability, and the other if carried under a limited or special contract—the shipper must have real freedom of choice. He cannot be denied the right to have his goods carried by the carrier under its common-law liability; but if he desires, and if the statute permits and public policy does not forbid, he may enter into a special contract with the carrier limiting the common-law liability. * * * But a common carrier cannot exact of a shipper his signature to a special contract limiting the common-law liability as a condition precedent of shipping or transporting stock, because, in such a case, the carrier resorts to unfair means. A contract thus exacted is not freely and fairly entered into." *A., T. & S. F. R. Co. v. Dill*, 48 Kan. 210, 29 Pac. 148. This being true, the contract pleaded in the answer was voidable at the plaintiff's election.

The defendant claims that the plaintiff affirmed the contract by surrendering it at Kansas City and procuring free transportation to his home. It is undisputed law that a party may not voluntarily act upon a contract which he has been constrained to sign, and voluntarily take the benefit of it, and then avoid it for duress. The rules applicable to the rescission of contracts on the ground of fraud apply. But things done in apparent recognition of the contract while the pressure of the hardship which overcomes the mind continues will not amount to an affirmation. The influence of the duress must be removed before conduct becomes voluntary, and, after that, acts charged as constituting a confirmation must be such as to indicate an intention to condone the wrong and a purpose to abide the consequences. Numerous decisions illustrate these principles.

In the case of *Montgomery v. Pickering*, 116 Mass. 227, a

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vendee fraudulently obtained a bond for a deed and a sum of condemnation money for a part of the property. With full knowledge of the fraud and of her rights, the vendor executed a deed pursuant to the bond. Afterwards she brought suit to set aside the conveyance. The opinion reads: "The deed in question does not expressly confirm the validity of the previous contract. It was not founded on any new consideration or given in settlement of a disputed claim. It was required by the terms of the original contract, and there is nothing to show an intention to forgive the fraud. To have effect as a confirmation, such deed must appear to have been given with that intention by one who was not under the influence of the previous transaction. When relied on as a defense in a case where fraud is clearly established, it is said that it must stand upon the clearest evidence, because the act is so inconsistent with justice and so likely to be connected with the fraud. *Norse v. Royal*, 12 Ves. 355, 373. The deed must be so disconnected with the previous dealings as to leave the grantor the complete power of determining, as upon an original act, whether he will do it or not (*Crowe v. Ballard*, 1 Ves. Jr. 215), or, as it is said in the more recent cases of *Moxon v. Payne*, L. R. 8 Ch. 881, the parties must be at arms' length and stand on equal terms." In the case of *Rau v. Von Zedlitz*, 132 Mass. 164, the syllabus reads: "If a woman on the eve of her marriage is induced by threats of the imprisonment of her intended husband, and by undue influence and fear that her marriage will otherwise be prevented, to sign an agreement to pay the debts of her intended husband, the agreement cannot be enforced in equity; and a part payment by her, after signing the agreement, on legal proceedings being threatened and in ignorance of her rights, is not in equity a ratification of the agreement. If a woman, induced by undue influence, signs an agreement to pay a debt of her intended husband, the fact that the creditor forbore to sue the original debt and to arrest the debtor and that the woman thereby obtained a husband and a title will not prevent the woman from setting up the defense of undue influence when the creditor seeks to enforce the contract in equity." In the opinion it is said: "But, to constitute a confirmation, the acts must have been done with that intention by one who was not under the influence of the previous transaction (*Montgomery v. Pickering*, 116 Mass. 227, and cases cited), and with a knowledge of its invalidity." In the case of *Leflore County v. Allen*, 80 Miss. 298, 31 South. 815, the syllabus reads: "The fact that a wife lived two years after making a deed void because made under threats of the prosecution of her husband, and expressed satisfaction at the acceptance of the deed and the prevention of disgrace, is not a sufficient ratification to validate the deed; the husband being still alive and subject to prosecution." In the case of *Bell v. Anderson*, 74 Wis. 638,

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43 N. W. 666, a defrauded vendee of a piano made an offer to return the instrument, which was not accepted, and then brought an action for the price paid. After the offer to return, she used the piano on occasions until the time of trial. In the opinion it is said: "The plaintiff testified that she had used the piano a little, as she had occasion, down to the time of trial. It is claimed that such use thereof is inconsistent with a rescission of the contract of purchase, and hence that her offer to return the instrument is nugatory. Such use may or may not be inconsistent with a rescission of the contract. Were we deciding the question of fact, inasmuch as the defendant, by refusing to take the piano from plaintiff's home, compelled her and her family to remain involuntary bailees of it, and, inasmuch as it is not suggested that it was injured by such use, we should hold the use not inconsistent with the rescission of the contract. But the most that can be successfully claimed by the defendants is that it was for the jury, under proper instructions, to say whether the use was such an assertion of ownership by the plaintiff as would render nugatory the offer to return the instrument." In the case of *Tarkington v. Purvis*, 128 Ind. 182, 25 N. E. 879, 9 L. R. A. 607, a fraudulent vendee sold some of the property after a right to rescind had been established by a tender and offer to place the vendor in *statu quo*. In the opinion it is said: "The doctrine is fully established that a contract induced by fraud is only voidable, and if one who has been defrauded, after discovering the deceit, acquiesces in the sale, either by express words or by any unequivocal act, such as treating the property as his own, with an intent to condone the fraud, he will be deemed to have elected to affirm the contract, and he cannot afterwards rescind. One who, uninfluenced by the fraud, deals with the property as his own after having fully discovered that fraud had been practiced upon him in the contract or transaction by or through which he acquired the property, thereby waives his right to rescind. * * * Equivocal acts, however, which do not clearly evince a purpose, with complete knowledge of the fraud, to retain the property as his own, will not defeat the right of the person defrauded to rescind. The act must be unequivocal, and must show an election to retain the property after discovering the deceit before the right to rescind is gone."

The return of the plaintiff to his home was an incident to the shipment of the cattle, and was bound up with it as the concluding feature of an entire transaction. The contract which he was forced to accept in order to get his cattle out of Ft. Scott compelled him to go with them or they would have been without care and attention on the road and without supervision at the unloading. These were responsibilities which he was obliged to assume in order to get the cattle moved. After they were marketed, the return home was not a separate and independent mat-

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ter of personal advantage, but was a final step of the transaction necessitated by what had gone before. It would be idle to contend that the plaintiff indisputably intended to condone the fraud and affirm the contract because he was relieved from payment of freight in advance, secured a night ride to Kansas City in the caboose of a freight train at the defendant's expense, and had a lower freight charge deducted from the proceeds of scale—assuming the defendant carried at a lower rate under special contract. All these things were immediate products of the vitiated agreement forced upon him by the conduct of the defendant's agent, and it cannot be said as a matter of law that he willingly acceded to them. The turning in of the contract and the acceptance and use of the pass bear the same relation to the original coercion. They were integral parts of the defendant's scheme which the plaintiff was driven to accept to save his cattle. A jury might be able to say that, as soon as the plaintiff was ready to go home, he commenced to deal with the defendant at arms' length, free from the constraint under which he had been acting, made up his mind to stand by the contract, and determined to get what he could out of it; but the law will not arbitrarily impose such an interpretation upon his conduct. The defendant might have had this question of fact, as well as the one first discussed above, submitted to the jury, but it made no request for instructions to that end.

The instruction given stated the law, and the judgment of the district court is affirmed. All the Justices concurring.

KELLY v. ADAMS EXPRESS CO.

(Court of Appeals of Kentucky, June 4, 1909.)

[119 S. W. Rep. 747.]

Carriers—Carriage of Live Stock—Duty of Carrier.—Defendant railroad, when its agent saw that a jack shipped by plaintiff was so frightened by a train as to throw him into an uncontrollable fit of terror, causing him to fall down in his crate, so that he could not get up, was bound to use ordinary care to protect the jack from further injury, and if to do so required him to be unloaded and recreated, or otherwise given attention, it should have been done at the first stopping place affording reasonable facilities for that purpose.

Carriers—Carriage of Live Stock—Injuries—Instructions.—In an action against a railroad for death of a jack shipped by plaintiff, instructions that, if the injury was the proximate result of defendant's failure to exercise reasonable care, plaintiff might recover, but that if the death resulted from a disease which the jack had when received for shipment, or by other causes not resulting from defendant's want of care, or from fright of the jack, not caused by want of care on defend-

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ant's part, defendant was not liable, did not preclude the jury from considering the question whether defendant's want of care on discovering that the jack had fallen in its crate as a result of fright and could not get up was the proximate cause of loss.

Carriers—Carriage of Live Stock—Injuries—Liability.*—Where defendant railroad undertook to use ordinary care in transporting plaintiff's jack, that plaintiff was present in the car and saw defendant fail to comply with the contract did not detract from defendant's liability, provided plaintiff's conduct did not amount to an estoppel.

Appeal and Error—Objections Not Raised Below.—Where plaintiff voluntarily assumed the burden of proof throughout the case, and made no objection that the burden was on defendant, he could not raise such point on appeal.

Appeal and Error—Harmless Error.—Though defendant carrier failed to complete its contract to transport plaintiff's jack, and plaintiff was entitled, in an action for death of the jack, to recover one-half the freight charges of \$31.68, the amount was too small to justify a reversal of a judgment for defendant, and new trial on that account alone.

Appeal from Circuit Court, Warren County.

"To be officially reported."

Action by James H. Kelly against the Adams Express Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Guy H. Herdman, B. F. Proctor, and Proctor & Herdman, for appellant.

Sims, Du Bose & Rodes, for appellee.

O'REAR, J. This action is based upon a contract of affreightment, by which appellee undertook, in consideration of \$31.68 to carry a jack for appellant from Bowling Green, Ky., to Sandusky, Mich. The jack was boxed in a crate and placed on the trucks at the depot at Bowling Green, apparently in good condition. A train which came into the station ahead of the one on which the jack was to be carried excited him so that in plunging he partially fell down in the crate and was not able to regain his position. He was loaded on the express car in a few minutes and started on his journey. Appellant was a passenger on the same train. At Lebanon Junction he went forward into the express car to see how the jack was faring, when he found him down in his box and unable to rise. The agent of the express company who was in charge of this car recommended that the jack be removed from the box. Appellant, who was without experience in shipping such live stock, said the matter was in the hands of the express agent. The latter decided to, and did, with appellant's help, take the jack out of the crate and laid him upon

*See extensive note, 11 R. R. R. 419, 34 Am. & Eng. R. Cas., N. S. 419.

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the floor of the express car. Still he was unable to get up. Appellant claims that the trunks and loose boxes near the jack's head, being jostled about by the swaying of the car, hit him on the head and mouth, causing them to bleed. The jack remained on the floor of the car until it reached Cincinnati, going by way of Louisville. At frequent intervals appellant went into the car to see the jack, but was unable to do anything for him. Appellant took another train at Cincinnati and did not see the jack again. At Cincinnati appellee's agents, being unable to get the jack upon his feet, called a veterinary surgeon and placed the animal in his charge, where, after lingering some days, it died. This suit was brought by appellant against appellee, charging it with a breach of the contract to carry the jack, in that it negligently allowed him to get hurt while in appellee's sole custody, from which he died, entailing a loss of \$600 on appellant. The answer denied the negligence, and denied that the jack was injured while in its charge, or died because of such injuries. It pleaded affirmatively that the jack, by reason of its own vicious propensities, injured itself, and that it died from a disease which it had before being delivered to appellee for transportation. An issue being joined, the case went to the jury, who returned a verdict for appellee.

The evidence tended to show that the jack was in apparently sound condition when delivered to appellee at Bowling Green. The veterinary at Cincinnati testified that the animal died as the result of azoturea, a disease of the muscles of the loins and hind quarters, due to excessive albumen in the blood, probably the result of overfeeding and lack of exercise. He further testified that there were no injuries of any consequence to the head. The evidence was such upon these issues that the case was one for the jury. It was sharply conflicting in material parts, and pretty equally balanced in weight. The court's instructions to the jury are in four paragraphs. The first told the jury that if the jack was injured while being shipped by the defendant, and the injury was the proximate result of the defendant's failure to exercise reasonable and proper care for the animal, they should find for the plaintiff the fair market value of the jack at Sandusky, Mich. The second paragraph of the instructions is in these words: "If the jury believe from the evidence that the death of the jack was caused by a disease which he had when received by defendant for shipment, or which was produced by other causes not the result of defendant's want of care, or by fright of the animal not caused by want of proper care on part of defendant in the shipment of said animal, they will find for the defendant; and they may find for it the necessary and reasonable amount expended, if anything, in an effort to cure the jack at Cincinnati, not to exceed the amount claimed by the defendant, to wit, \$50." The third paragraph was an unobjectionable definition of care, and

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the fourth withdrew certain evidence which had been objected to by the plaintiff, and which is not assigned as error by the appellant on this appeal.

While the language of the petition is perhaps broad enough to have allowed a recovery for the loss of the jack, from whatever cause, for which the defendant was liable, the real issues tried out in the circuit court, and which were those evidently in the minds of the parties, were: (1) Whether the jack was injured physically while in the defendant's custody, and as the result of the carrier's negligence; and (2) whether it died from a disease which it had before it was delivered to the defendant, and independent of any injury inflicted upon it because of the defendant's negligence. While the plaintiff objected formally to each of the first three instructions, he did not offer any other presenting his view of the law of the case. Nor does he now contend that there was error in those instructions, other than that the carrier should have been held as an insurer of the safety of the animal; at least, that it was incumbent on the carrier to show, when it failed to deliver the animal, that the failure was due to some disease, vice, or propensity of the animal itself. It has occurred to us, and we think it proper to say, that the express company, when its agent saw that the jack was so frightened as to throw him into an uncontrollable fit of terror, causing him to fall down in his crate, so that he could not get up, was under the duty to use ordinary care to protect the animal from further injury; and if to do so required him to be unloaded and recrated, or otherwise given attention, it should have been done at the first place at which the train stopped and which afforded reasonable facilities for that purpose; for it may be that the animal had incipiently azoturea, and that its fright tended to aggravate the malady, for neither of which was the carrier liable. But if the animal got down in such position as to show that he was sick, or liable to be injured by its unnatural and enforced posture, the carrier ought not to have carried it on for hundreds of miles, past many stops, until the brute was practically dead, before taking steps for its relief; and if such neglect was a contributing cause to the death of the animal, but for which it probably would not have died, it should have been left to the jury to say whether that neglect was the proximate cause of the loss. But, as we have seen, no specific instruction was requested upon this point, and a careful analysis of the second instruction will show that it might have embraced the identical point being discussed, though it was presented negatively.

We cannot say that the jury were precluded by the instructions from considering the phase of the case which has just been discussed, and which impresses us as constituting appellant's real cause of action. Appellant's presence at times upon the car did not absolve appellee from any of its liability under its contract.

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Appellee undertook by contract, in consideration of the tariff charged, to use ordinary care and attention in transporting the jack. The fact that appellant was present and saw it fail to comply with the contract detracts nothing from its liability, so long as appellant's conduct did not amount to an estoppel; and it is not contended in this case that it had that effect.

The principal error assigned by appellant for a reversal is that the court ruled against him and to his prejudice in placing upon him the burden of proof in the case; that the instructions should not have imposed upon him the burden of showing that the jack was lost, not by reason of some disease or vicious propensity of its own. It is contended that the carrier is an insurer against its own negligence as to live stock, as it is to inert freight; but that the qualification noted in reported cases, to the effect that the injuries received by live stock because of its own vicious nature, or disposition, or from diseases not caused by the carrier's negligence, is a matter of special defense. Let it be granted; still appellant cannot avail himself of his contention in this case, because he voluntarily assumed the onus throughout the case, and made no objection on that ground at any stage of the trial. He is now bound by his conduct.

Appellant also claims that inasmuch as he paid the freight, \$31.68, for carrying the jack through from Bowling Green to Sandusky, and as the appellee executed only part of the contract, he was entitled to recover the amount paid as freight. While there may be circumstances under which the carrier may be absolved from performing the contract, having only partially done so, which entitles the shipper to have refunded the sum represented by the tariff for the part of the shipment not executed, there is no evidence in this case, and none offered, as to what proportion of the charges had been earned by the carrier. Assuming it was one-half, the amount remaining is too small to justify a reversal of the judgment on that account alone, and to order a new trial of the case.

Judgment affirmed.

DIECKMANN v. CHICAGO & N. W. RY. CO.

(Supreme Court of Iowa, June 5, 1909.)

[121 N. W. Rep. 676.]

Carriers—Passengers—The Relation.*—One going to the depot within a reasonable time before the departure of a train, with the bona fide intention of taking passage thereon, which he indicates to the carriers by purchasing a ticket, or otherwise, is a passenger, and entitled to all the rights of a passenger.

* **Carriers—Passengers—Injury Actions—Burden of Proof—Freedom from Negligence.†**—A showing that a passenger was killed by a train under the carrier's management and control casts the burden upon it to negative the presumption that it was negligence.

Carriers—Passengers—Injuries—Negligence.†—Where a railroad company required its passengers, in order to board west-bound trains, to cross two tracks to another platform, the tracks as they approached the depot being straight for several miles, the company was bound to know that at night a headlight would not accurately inform an ordinary observer of the distance of an approaching train from the depot.

*See first foot-note of *McFeat v. Philadelphia, etc., R. Co.* (Del.), 30 R. R. R. 254, 53 Am. & Eng. R. Cas., N. S., 254; first head-note of *Powell v. Philadelphia & R. Ry. Co.* (Pa.), 30 R. R. R. 536, 53 Am. & Eng. R. Cas., N. S., 536; first head-note of *Pere Marquette R. Co. v. Strange* (Ind.), 30 R. R. R. 66, 53 Am. & Eng. R. Cas., N. S., 66.

†For the authorities in this series on the question whether a presumption of negligence on the part of the carrier arises from the fact that a passenger is injured, see last foot-note of *Armstrong v. Portland Ry. Co.* (Ore.), 31 R. R. R. 89, 54 Am. & Eng. R. Cas., N. S., 89; third foot-note of *Taber v. Seaboard A. L. Ry.* (S. Car.), 31 R. R. R. 60, 54 Am. & Eng. R. Cas., N. S., 60; first foot-note of *McLean v. Atlantic Coast Line R. Co.* (S. Car.), 30 R. R. R. 76, 53 Am. & Eng. R. Cas., N. S., 76; second foot-note of *Pere Marquette R. Co. v. Strange* (Ind.), 30 R. R. R. 66, 53 Am. & Eng. R. Cas., N. S., 66; first head-note of *Paul v. Salt Lake City R. Co.* (Utah), 30 R. R. R. 144, 53 Am. & Eng. R. Cas., N. S., 144; first head-note of *Ginn v. Pennsylvania R. Co.* (Pa.), 30 R. R. R. 650, 53 Am. & Eng. R. Cas., N. S., 650; foot-note of *McGann v. Boston Elev. Ry. Co.* (Mass.), 30 R. R. R. 618, 53 Am. & Eng. R. Cas., N. S., 618; first foot-note of *Briggs v. Durham Traction Co.* (N. Car.), 30 R. R. R. 324, 53 Am. & Eng. R. Cas., N. S., 324; foot-note of *Russell v. Seattle, etc., Co.* (Wash.), 29 R. R. R. 321, 52 Am. & Eng. R. Cas., N. S., 321; foot-note of *Central, etc., Ry. Co. v. Geopp* (Ala.), 29 R. R. R. 315, 52 Am. & Eng. R. Cas., N. S., 315; first foot-note of *Birmingham, etc., Co. v. Sawyer* (Ala.), 29 R. R. R. 779, 52 Am. & Eng. R. Cas., N. S., 779; first foot-note of *Kansas City S. Ry. Co. v. Davis* (Ark.), 29 R. R. R. 664, 52 Am. & Eng. R. Cas., N. S., 664; first foot-note of *Cleveland, etc., Ry. v. Hadley* (Ind.), 29 R. R. R. 638, 52 Am. & Eng. R. Cas., N. S., 638; *Cleveland, etc., Ry. v. Hadley* (Ind.), 29 R. R. R. 10, 52 Am. & Eng. R. Cas., N. S., 10.

‡For the authorities in this series on the subject of the liabilities of a railroad company with respect to its passengers struck by trains while crossing tracks between depots and trains, see first foot-note of

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Carriers—Passengers—Care Required.§—A passenger is entitled to the exercise of the requisite care due him from the time he enters the station to take passage, and may assume that in going to the train and entering the cars, he will be vigilantly protected from danger by the carrier's agent.

Carriers—Passengers—Injuries—Actions—Jury Question—Negligence.—In an action for a passenger's death while crossing the tracks from the depot to a platform for passengers taking a certain train, after the agent had announced the train and started himself across the track, whether the agent negligently notified decedent to cross the track, and negligently directed him in front of the train, held for the jury.

Carriers—Passengers—Injuries—Negligence.‡—Where the company required passengers to cross two tracks to another platform, to take west-bound trains, it was bound to provide a reasonably safe way for crossing, and to exercise the highest degree of care to protect passengers while crossing the tracks, and would be negligent for failure to announce the train in time, or light the crossing, or guide passengers across the tracks, if due care required such precautions, or for negligently performing such services so as to endanger passengers.

Carriers—Passengers—Injuries—Contributory Negligence.§—Where the company's agent requested decedent and other passengers to cross the tracks to the platform so as to take the train, his invitation was an implied assurance, upon which decedent could rely, that he could cross the tracks safely, and he would not be negligent unless the danger from the train's approach was so imminent that, as an ordinarily prudent person he should have known the peril in crossing.

Negligence—Contributory Negligence—Jury Question.—Contributory negligence is peculiarly a question of fact, and should not be decided as a matter of law, unless the circumstances are so clear and undisputed that fair minds cannot differ in their conclusions therefrom.

Carriers—Passengers—Injuries—Contributory Negligence.§—While a passenger's right to assume that the company's agent had announced an approaching train in time to enable him to cross the tracks to the platform in safety, and that a safe access to the platform was provided, did not relieve him from exercising due care for his own safety, those considerations were material in determining whether the passenger exercised due care in crossing.

Railroads—Crossing Accidents.§—An invitation to a traveler to cross

Atchison, etc., Ry. Co. v. McElroy (Kan.), 25 R. R. R. 487, 48 Am. & Eng. R. Cas., N. S., 487, where all those preceding it are collected; Bessecker v. Delaware, etc., R. Co. (Pa.), 30 R. R. R. 358, 53 Am. & Eng. R. Cas., N. S., 358; third head-note of Pere Marquette R. Co. v. Strange (Ind.), 30 R. R. R. 66, 53 Am. & Eng. R. Cas., N. S., 66.

‡See foot-note on preceding page.

§For the authorities in this series on the subject of the right of a passenger to rely on the assumption that the carrier has performed, or will perform, its duties to him, see first foot-note of Chicago, etc., Ry. Co. v. Simpson (Ark.), 30 R. R. R. 798, 53 Am. & Eng. R. Cas., N. S., 798; first foot-note of Olson v. Northern Pac. Ry. Co. (Wash.),

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the tracks by a railroad crossing watchman excuses the traveler from the ordinary duty to stop, look, and listen for approaching trains before crossing; he being ordinarily entitled to rely on the agent's assurance of safety.

Railroads—Crossing Accidents—Contributory Negligence—Questions for Jury.||—One is not in all cases negligent as a matter of law in crossing a track with knowledge of an approaching train, the question depending upon the relative distance of the person and the train from the crossing and other circumstances; and, if it is so near, and going so fast, that one should know, as a prudent person, that he could not cross without danger, an attempt to cross is negligence.

Carriers—Passengers—Injuries—Jury Question—Contributory Negligence.||—In an action for the death of a passenger by being struck by a train while he was attempting to cross the tracks to another platform to take the train, after the agent had notified him of the train's approach and requested him to cross over to the platform, whether decedent was himself negligent held for the jury.

Sherwin, J., dissenting.

Appeal from District Court, Linn County; B. H. MILLER, Judge.

Action to recover damages for the death of Frederick J. Dieckmann. There was a direct verdict and judgment for defendant, and plaintiff appeals. Reversed.

For former opinion, see 105 N. W. 526.

Charles A. Clark & Son and Wm. G. Clark, for appellant.

James C. Davis, Clark & McLaughlin, and Grimm, Trewin & Moffitt, for appellee.

29 R. R. R. 705, 52 Am. & Eng. R. Cas., N. S., 705; first foot-note of *Harper v. Pittsburg, etc., Ry. Co. (Pa.)*, 29 R. R. R. 650, 52 Am. & Eng. R. Cas., N. S., 650.

||For the authorities in this series on the subject of the contributory negligence of passengers while crossing tracks between depots and their trains, see foot-note appended to *Atchison, etc., Ry. Co. v. McElroy (Kan.)*, 25 R. R. R. 487, 48 Am. & Eng. R. Cas., N. S., 487, where all those preceding it are collected; second head-note of *Spiking v. Consolidated Ry. & P. Co. (Utah)*, 27 R. R. R. 457, 50 Am. & Eng. R. Cas., N. S., 457; fifth head-note of *Gregg v. Northern Pac. Ry. Co. (Wash.)*, 28 R. R. R. 519, 51 Am. & Eng. R. Cas., N. S., 519; second head-note of *Harper v. Pittsburg, etc., Ry. Co. (Pa.)*, 29 R. R. R. 650, 52 Am. & Eng. R. Cas., N. S., 650.

||For the authorities in this series on the question whether there may be a recovery for injuries sustained in an attempt to cross tracks in front of a car or train which the injured person knew was approaching before he made the attempt to cross, see second foot-note of *Cable v. Spokane, etc., R. Co. (Wash.)*, 31 R. R. R. 206, 54 Am. & Eng. R. Cas., N. S., 206; foot-note appended to *Hermeling v. Chicago, etc., Ry. Co. (Minn.)*, 30 R. R. R. 234, 53 Am. & Eng. R. Cas., N. S., 234; second foot-note of *Powers v. Des Moines City Ry. Co. (Iowa)*, 29 R. R. R. 709, 52 Am. & Eng. R. Cas., N. S., 709; *Casey v. Boston Elevated Ry. Co. (Mass.)*, 29 R. R. R. 245, 52 Am. & Eng. R. Cas., N. S., 245.

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WEAVER, J. The following facts are undisputed: The defendant operates a double track railway, passing east and west through the town of De Witt, Iowa. The ticket office, waiting room, and main platform of the station are north of the tracks. Trains move eastward on the north track and westward on the south track, and west-bound passengers are required to pass from the main platform over a planked way across both tracks to a platform on the south side in order to board their trains. At about 11 o'clock of the night of March 31, 1902, Frederick J. Dieckmann, a traveling salesman, went to the station to take the west-bound train, which was due there about 20 minutes later. He purchased a ticket from De Witt to Cedar Rapids, and when the approach of the train was announced, or very soon thereafter, he picked up the grips which he was carrying, and started in the direction of the south platform. At or about the same time the station agent, taking a lantern, went in the same direction, and both he and Dieckmann were struck by the train, the former being instantly killed, and the latter mortally injured, dying the next day.

Concerning the details with which this general outline of conceded facts is to be filled, there is some dispute and uncertainty. There is, however, evidence which tends to show that it was the custom or practice of the agent, on the approach of west-bound trains, to call out, "Train west! All passengers cross over to the south side." At night he carried a lantern, and, after announcing the train, crossed over to the south platform. In so doing he was in the habit of showing the planked way or crossing to the passengers about to depart, and assisting them over, if assistance appeared to be needed. On the night in question he was heard to make the usual announcement; then, taking his lantern and some mail in his hand, started from the office in the direction of the south platform, followed by the deceased. The engineer in charge of the locomotive testifies that the train was moving at probably 40 miles per hour, and was one minute ahead of schedule time as it entered the De Witt yards and 16 miles per hour at the east end of the platform, which speed he thinks had been reduced to 8 miles when the collision occurred. The headlight would not distinctly reveal to the engineer the form of a man at the distance of 100 feet, but in his judgment it would do so at 50 feet. For an instant, as he approached, his eye was diverted to the air gauge of the engine, and, as he looked forward again when very near the crossing, he distinctly saw two men apparently running across the track to the south, one being slightly ahead of the other, the one in the rear carrying a lantern. Almost at the same instant, and before any effective measure could be taken to stop the train, both men were struck, with the results already mentioned. A witness for defendant, who claims to have seen the collision, states that the agent and himself crossed

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the tracks in safety to the south platform, and on turning saw Dieckmann coming carrying three grips. On reaching the north track witness says Dieckmann fell, and, arising and hurrying forward he fell again on the south track, when the agent went back and laid hold of him, and was trying to drag him from the track when the engine came upon them. This witness and the engineer are the only persons testifying as eyewitnesses of the accident, and it is evident that one of them is mistaken as to some of its material circumstances. In corroboration of the engineer's statement it may also be said that the body of the agent was found under the north wheel of the engine or on the north rail; while the body of deceased lay on the platform on the south side of the south rail. Which story is the more worthy of credit is not a question for the court to consider; nor are we prepared to say that if the latter version is correct, it is decisive of the case.

Plaintiff's claim for damages is based upon the theory that, when Dieckmann went to the station and purchased a ticket for passage on a train nearly due, the relation of carrier and passenger then became effective, and that the railway company thereupon became bound to exercise the highest degree of care for his safety, and to provide him a safe way to the train and opportunity to reach the platform without injury, as well as to furnish proper escort and direction to the passenger if reasonably necessary to insure such safety. In these respects it is alleged the company was negligent. The defendant denies negligence on its part, and insists that the intestate was clearly guilty of contributory negligence. Upon a former submission the ruling of the trial court directing a verdict for defendant was sustained (*Dieckmann v. R. R. Co.* [Iowa] 105 N. W. 526); but, a petition for rehearing having been granted, the case has been reargued by counsel on both sides with great thoroughness. The material questions may be considered in the following order:

1. We will first inquire as to the relation existing between the appellant and the deceased at the time of the accident and the measure of the duty, if any, which the former owed to the latter. Mr. Hutchinson states the general rule to be that a person who goes to the station of a railway company within reasonable time prior to the hour set for the departure of a train, with the bona fide intention of taking passage thereon, and there, either by purchasing a ticket, or in some other manner indicates such intention to the carrier, he is considered to be a passenger, and entitled to all rights and privileges which the law attaches to that relation. 2 Hutchinson on Carriers (3d Ed.) 1006. Such is also the rule of the decisions and text-books generally. 1 Fetter on Carriers of Passengers, § 55; *Chicago, etc., R. R. Co. v. Walker*, 217 Ill. 605, 75 N. E. 520; *Warren v. R. R. Co.*, 8 Allen (Mass.) 227, 85 Am. Dec. 700; *Knight v. R. R. Co.*, 56 Me. 234, 96 Am.

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Dec. 449; *Gaynor v. R. R. Co.*, 100 Mass. 208, 97 Am. Dec. 96; *R. R. Co. v. Ryan*, 165 Ill. 88, 46 N. E. 208; *Warner v. R. R. Co.*, 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491; *Norfolk & Western Ry. Co. v. Galliher*, 89 Va. 639, 16 S. E. 935; *Baltimore & O. Ry. Co. v. State*, 63 Md. 135; *Id.*, 81 Md. 371, 32 Atl. 201; *R. R. Co. v. Perry*, 58 Ga. 461; *R. R. Co. v. Franklin* (Tex. Civ. App.), 44 S. W. 701; *Rogers v. Steamboat Co.*, 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491; *Atchinson, etc., R. Co. v. Holloway*, 71 Kan. 1, 80 Pac. 31, 114 Am. St. Rep. 462; *Jordan v. R. R. Co.*, 165 Mass. 346, 43 N. E. 111, 32 L. R. A. 101, 52 Am. St. Rep. 522. This court is also committed to the same doctrine. *Allender v. R. R. Co.*, 37 Iowa, 270; *Ramm v. R. R. Co.*, 94 Iowa, 296, 62 N. W. 751. We must therefore consider the deceased to have been a passenger at the time he attempted to cross the tracks, and the degree of care which the company was bound to exercise for his safety must be measured accordingly. It is also to be observed that, when it was shown that deceased sustained the relation of passenger, and that he was killed by a train under the management and control of the defendant as carrier, the burden was cast upon it to negative the inference or presumption of negligence on its part. 5 *Hutchinson on Carriers* (3d Ed.) § 1413.

2. It is claimed by appellant that the railway company negligently failed to control or reduce the speed of the train in approaching the station. Upon the former hearing to this appeal the court in its opinion held that the case would have been one for the jury on the question of excessive speed but for the fact that the contributory negligence of the deceased exonerated the company from liability. Counsel for appellee insist that no rate of speed in the movement of a railway train can be negligence *per se*, and that the case before us presents no circumstances from which a finding of want of reasonable care by the company in this respect can be sustained. We have quite frequently said that no conceivable rate of speed by a railway train in the open country will be held negligent as a matter of law, but we have nowhere held that the rate of speed upon or across city streets or public crossings, or on station grounds where passengers may rightfully go, may not under some circumstances be found negligent as a matter of fact. *Kinyon v. R. R. Co.*, 118 Iowa, 349, 92 N. W. 40, 96 Am. St. Rep. 382; *Artz v. R. R. Co.*, 44 Iowa, 285.

In the case before us the company required its passengers desiring to board the west-bound train to leave its waiting rooms and cross both tracks to the south platform. The approach of these tracks from the east was from a straight line of several miles. At night, in the very nature of things, the view of a locomotive headlight, coming straight on through the darkness would give the ordinary observer a very inadequate idea of its distance, or of the speed of its approach. Of all these things the

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company must be held to have had knowledge, and we think it a fair question for the jury to say whether, in view of the known danger to which the company's method of business exposed its passengers in this respect, and all the circumstances attending the accident, the train at that moment was or was not being operated at a reasonable speed. While the engineer estimates that he entered the yards at 40 miles per hour, and had reduced the speed to 8 miles at the place of the accident, and there is no reason to question his good faith, there are admitted circumstances from which the jury could reasonably conclude that his estimate of speed is too low. We are therefore inclined to reaffirm our former conclusion on this branch of the case, and say that the jury was entitled to consider whether due care in approaching the platform was exercised. Moreover, under the rule above cited, which casts upon the railway company the duty of negating the inference of negligence arising from the injury of plaintiff by the movement of its train, it was very clearly for the jury to say whether the evidence offered in defense was sufficient to overcome the *prima facie* case thus made. That rule of care due the passenger applies from the moment he enters the station for the purpose of embarking upon an approaching train, and he has the right to expect that in going to the train and entering the cars at the place prepared for that purpose his safety will be vigilantly guarded by the carrier's agents.

Directly in point upon this subject is the language of the Supreme Court of Maryland: "Carriers of passengers have in their charge the lives and safety of those they undertake to transport, and are subjected to a responsibility proportioned to the gravity of the trust reposed in them. They are bound to use the utmost degree of care, skill and diligence in everything that concerns the safety of passengers, nor are their duties limited to the mere transportation of them. They are bound to provide safe and convenient modes of access to their trains, and of departure from them." *R. R. Co. v. Anderson*, 72 Md. 519, 20 Atl. 2, 8 L. R. A. 673, 20 Am. St. Rep. 483. In the same case it is held that, where the relation of carrier and passenger exists, and the latter is injured by the movement of the carrier's train, these facts being shown, the onus is upon the carrier to show that it was guilty of no negligence with respect to the accident. And this, says the court, can only be done by proving the facts and circumstances explaining the cause of the accident, and showing it to be such as could not have been guarded against by the utmost degree of diligence; or, in other words, quoting the language of Chief Justice Shaw, "the most exact care and diligence, not only in the management and care of the train and cars, but also in the construction and care of the track, and in all subsidiary arrangements necessary to the safety of passengers." That the station agent in the present instance invited the deceased to cross the track,

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and thereby led him into imminent peril, is shown beyond all question, and that he, or the engineer in charge of the train, or both, were negligent is so clear that to say as a matter of law they were both exercising due care for the passengers' safety would be a palpable absurdity.

3. Another ground of alleged negligence, as stated in the petition, is that the defendant by its agent carelessly and negligently notified and directed the deceased to cross the tracks, and negligently undertook to, and did, escort and direct or lead him upon the crossing in front of the train by which he was run down. Here, too, we think the testimony makes a case on which the plaintiff was entitled to go to the jury. The arrangement of the station, tracks, and platform to which we have referred, and the necessity thus created for west-bound passengers to cross said tracks in front of the coming train, made it incumbent on the defendant company to provide at least a reasonably safe way for such crossing to be made, and to exercise the highest degree of care to protect them from injury in making the passage. If due care in this respect required a timely announcement of the approach of the train, or the use of a light by lantern or lamp to illuminate the path, or the services of a guide or escort to conduct the passengers to the proper platform (and that was for the jury to say), the failure to provide these safeguards would be negligence; and if, having provided them, the announcement is delayed so long, or the other service is so carelessly or inefficiently performed, that a passenger is exposed or led into danger which proper care on the part of the company's agents would have avoided, it is properly held liable for the consequences, unless relieved therefrom by a failure to show reasonable care on part of the passenger. This rule has not infrequently been applied to cases very similar in their facts to those now under consideration. *R. R. Co. v. Morgan*, 26 Tex. Civ. App. 378, 64 S. W. 688; *Shearman and Redfield on Negligence*, § 525; *Warner v. R. R. Co.*, 168 U. S. 346, 18 Sup. Ct. 68, 42 L. Ed. 491; *Warren v. R. R. Co.*, 8 Allen (Mass.) 227, 85 Am. Dec. 700; *R. R. Co. v. Ryan*, 165 Ill. 88, 46 N. E. 208; *Beecher v. R. R. Co.*, 161 N. Y. 225, 55 N. E. 899; *Wheelock v. R. R. Co.*, 105 Mass. 207; *Chaffee v. R. R. Co.*, 104 Mass. 108.

4. If we are correct in the foregoing conclusion, and the question of due care on part of the company was one of fact for the jury, the ruling of the trial court in directing a verdict for defendant cannot be upheld, unless we are able to say as a matter of law that the deceased was guilty of contributory negligence. On the affirmative of this proposition the appellee lays great stress in argument; but, after re-examining the record with much care, we are strongly of the opinion that this, too, was a question for the jury. The fact that deceased undertook to cross a track on which he knew a train was approaching was not necessarily neg-

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ligent in law or in fact. The construction and arrangement of the station and platform made the crossing necessary. There was no other way provided for boarding the train. The defendant must be held to have invited the deceased to go to the platform, and by such invitation have given him implied assurance that the train was at such distance, and moving at such rate, that he could cross the track with safety. In accepting that invitation and acting upon it he cannot be charged with culpable negligence, unless the danger of collision was so manifestly imminent that he knew, or as an ordinarily prudent person under all the circumstances he should have known, of the peril to which he was thereby exposed. We are not ready to say that a passenger waiting at a station in the night-time is negligent as a matter of law because he relies upon the agent, and acts upon his announcement of the approach of a train, and follows or accompanies him across the track to the appropriate platform. The circumstances may have been such that he ought to have disregarded the invitation and refused to attempt the crossing, but certainly that conclusion is not so clear or so imperative as to compel the assent of all reasonable minds. Contributory negligence is peculiarly a question of fact, and the court should not attempt to dispose of it peremptorily, save where the circumstances are clear and undisputed, and are of such character that fair and unprejudicial minds cannot arrive at different conclusions therefrom. The deceased was entitled to the highest degree of care by the defendant for his protection. He was entitled to assume that a reasonably safe way had been provided for his access to the platform. He was justified in assuming that the announcement was made in due time, so that, acting with proper dispatch, he could pass in safety from the waiting room to the platform. True, these things did not absolve him from the duty to exercise reasonable care for his own safety, but they are material and necessary elements for consideration in determining what were the requirements of reasonable care on his part under all the circumstances, and this is a question of fact, and not of law, to be answered only by duly weighing all the testimony bearing thereon. *Warner v. R. R. Co.*, 168 U. S. 346, 18 Sup. Ct. 68, 42 L. Ed. 491; *Brassell v. R. R. Co.*, 84 N. Y. 244; *Gaynor v. R. R. Co.*, 100 Mass. 212, 97 Am. Dec. 96; *Beecher v. R. R. Co.*, 161 N. Y. 225, 55 N. E. 899; *Atchison, etc., R. Co. v. Holloway*, 71 Kan. 1, 80 Pac. 31, 114 Am. St. Rep. 462.

In *Mavo v. R. R. Co.*, 104 Mass. 141, the court speaking with reference to alleged contributory negligence of a passenger while crossing a track at a railway station, says: "Although the burden of proof still remains upon the plaintiff in these cases to show the exercise of such degree of care as was appropriate to the place and occasion, yet the court will not attempt to decide the question of due care upon the preponderance of evidence. The

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surrounding circumstances, and the whole conduct of plaintiff in reference thereto, will ordinarily afford ground for such a variety of inferences as to make the verdict of a jury the only proper means to determine the essential fact. However indicative of carelessness the circumstances may seem to the court, if there be any evidence on which it is competent for the jury to find that reasonable care was in fact exercised, is it proper to submit it to them." The same court, in *Gaynor v. R. R. Co.*, 100 Mass. 212, 97 Am. Dec. 96, discussing the same question of contributory negligence in crossing a railway track, makes use of the following expression: "When the circumstances under which the plaintiff acts are complicated, and the general knowledge and experience of men do not at once condemn his conduct as careless, it is plainly to be submitted to the jury. What is ordinary care in such cases, even though the facts are undisputed, is peculiarly a question of fact, to be determined by the jury under proper instructions. It is the judgment and experience of the jury, and not of the judge, which is to be appealed to." The Illinois court has said: "It is always a question for the jury to determine from the evidence whether the person injured has exercised proper care and caution in crossing a railroad track, and not a question of law." *R. R. Co. v. Frana*, 112 Ill. 405; *R. R. Co. v. Hutchinson*, 120 Ill. 587, 11 N. E. 855.

Since this case was originally submitted several decisions quite in point have been announced in other jurisdictions, and to some of these we call attention. *Chunn v. Railroad Company* (decided by the Supreme Court of the United States November 8, 1907), 207 U. S. 302, 28 Sup. Ct. 63, 52 L. Ed. 219, presents a case where the plaintiff went at night to the station to take passage on a car soon to arrive. The road was double-tracked, and a platform for the use of the passengers had been provided along the outside. The narrow space between the tracks was also planked, and passengers sometimes stood there when waiting to board the cars. Plaintiff took her stand upon this narrow place. From this position she could, if she looked, see an approaching car from either direction for a distance of at least a quarter of a mile. Standing there, as the train she was expecting approached, she was struck and injured by another car coming in from the opposite direction on the other track. Having brought action to recover damage, the trial court directed a verdict for the company, on the theory that plaintiff was guilty of contributory negligence as a matter of law. This judgment was affirmed by the Court of Appeals of the District of Columbia, which decision was reversed by the Supreme Court. After first finding that the plaintiff was not a trespasser, the court proceeds to say that: "She was not as a matter of law guilty of negligence in failing to appreciate accurately the boundaries of the narrow zone of safety which the defendant's conduct had left her."

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More closely parallel to the case at bar is *Karr v. Traction Company*, decided by the Wisconsin court, and reported in 132 Wis. 662, 113 N. W. 62, 13 L. R. A. (N. S.) 283, 122 Am. St. Rep. 1017. There the defendant operated a double track electric railway. At one of its stations or stopping places, where no agent or attendant was in charge, it erected between its tracks a device for giving the stop signal by passengers awaiting at night. It was so arranged that, when a lever attached to the device was lifted, a light would be displayed from the top of a pole, and on releasing the lever the light would be extinguished. Attached to the device was a printed card instructing the passengers to hold up the handle until the car was in sight. As the entrance to the cars was from the outside of the track, the passenger, after giving the signal, was of necessity obliged to pass back again across the track in front of the approaching car, or wait until it stopped, and then walk around it to the opposite side. On a dark night the plaintiff, desiring to take a car, went to the signal post, and, when he saw or heard the car approaching, displayed the signal, and on hearing the whistle sounded by the motorman, undertook to cross the track, and was run down. When the light was displayed the car was only about 110 feet distant, and running very rapidly, and plaintiff had taken but two or three steps from the signal post when he was struck. To the contention of the defendant that in crossing the track in front of the rapidly moving car plaintiff was guilty of contributory negligence as a matter of law, the court, after reciting the conditions under which the accident occurred, says: "One who had by daylight observation become familiar with these conditions and these measurements, and the place of stopping the north-bound car, might, and probably would, remain between the tracks after he had held up the signal light and until the train arrived, but a person not possessing this familiarity, and arriving on a dark night where distances cannot be so accurately estimated, might ordinarily and usually, in view of the position of the signal light on the center pole, the printed and inadequate instructions thereon, and the necessity of boarding the car from the outside, cross over from that side immediately upon letting go of the signal light. This was for the jury to decide. * * * The reason for the distinction between the case of a passenger crossing a track under such circumstances and the ordinary pedestrian bearing no such relation to the railway company appears to rest upon the possibility or probability that a reasonably prudent man, in the exercise of ordinary care, might well believe, in the face of such implied invitation to cross, the movements of passing trains would be so regulated or adjusted as to permit his crossing in safety. The jury was authorized to infer from the evidence that the plaintiff as a reasonably prudent man understood that he was obliged to cross the east track in order to board the car in question, and to cross at

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the time and in the manner in which he did cross, and that due care would be exercised by the defendant for the safety of those so crossing by stopping south of or at the signal light. The jury had also the right to consider that the plaintiff was so near the inner rail, and in such a position in giving the signal, that an ordinarily prudent man, knowing that the car would stop for only a moment to permit him to embark, might have considered it the proper course for him to cross the track at the time and in the manner he did cross it in order to enter the car. It was essentially a question of fact, and not one of law, whether or not an ordinarily prudent man would, under the circumstances, have done as plaintiff did." These words apply with increased force to the case before us. The deceased was a passenger, and entitled to protection as such. He was not only impliedly, but expressly, invited to cross the track in front of the incoming train. It was the only method provided to enable him to take passage upon it. The place, except the small area illuminated by the agent's lantern, was enveloped in the darkness of night. The only visible sign of the approaching train was the headlight, of the engine coming "head on" through the darkness up a long stretch of straight track, a situation in which it was manifestly difficult, if not impossible, to judge accurately of its speed or distance. The agent to whom was intrusted the duty to guide him across the track, and on whom he as a passenger had a legal right to rely, directed him to take the south platform, and in following this direction the collision occurred. Nor is it to be overlooked that the train was a minute ahead of time, and this fact is not without material bearing upon the question whether deceased as a reasonably prudent person may not have believed he had ample time to make the crossing in safety. We can imagine no state of circumstances calling more loudly for the application of the principles stated by the Wisconsin court, *supra*, justifying the passenger, as a reasonably prudent man, in believing that in the face of such invitation to cross the track, the movements of trains thereon would be so regulated and adjusted as to permit his crossing in safety.

A discussion by the court in *Doyle v. Railroad Co.*, 145 Mass. 386, 14 N. E. 461, is also quite pertinent to the question here presented. The deceased was driving in the nighttime over a crossing of the defendant's tracks in the city of Boston. The crossing was guarded with gates, operated by a gateman, and was also protected by a gong, which sounded on the approach of a train. The gates being open, the deceased undertook to cross; but, before he reached the track on which the train was coming, the alarm was sounded, and the gateman, seeing him, called to him to stop, and, as was claimed, immediately called to him again to go on. The deceased evidently either heard the alarm, or saw the approach of the train, for he was seen to start suddenly, whip

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up his horses, and endeavor to make the passage, but failed, and was killed. The opinion, delivered by Holmes, J., says of the question of contributory negligence: "We cannot say as a matter of law that deceased was guilty of gross negligence. The plaintiff's evidence tended to show that he had got halfway across before there was any warning, and before the gates were shut; that the first warning he received was when the gates were shut, and the gateman shouted 'Stop!' a shout which he may have heard only as an alarming sound; that then, practically all at once, the deceased whipped his horse, the gateman shouted to him to 'Come on!' and opened again the gate in front of him. We do not say that this seems to us the most probable view of the facts, but it is one which the jury might have taken on the evidence. Going on under the circumstances was a mistake, but we cannot say it was gross negligence. Something must be allowed for the natural impulse which some people feel when suddenly startled and alarmed to leap forward, and more for the natural tendency to follow the gateman's directions." We have ourselves, within the last few weeks, held it error for the court to direct a verdict for the defendant in a crossing accident case where the alleged negligence of the company and freedom from contributory negligence by the plaintiff were sustained by evidence far less persuasive than is presented by the record now before us. See *Calwell v. R. R. Co. (Iowa)*, 115 N. W. 605.

The effect of an invitation, express or implied, by a gateman, station agent, conductor, or other employee to a passenger to cross a railway track, either for access to, or exit from, a train, has often been considered by the courts in relation to the question of contributory negligence. It has also frequently arisen in cases of injury to highway travelers; and, even in this class of cases, where the rule of care by the railway company is much less stringent than in the case of injury to passengers, it is universally held that such invitation excuses the person attempting the crossing from the ordinary obligation to stop, look, and listen for approaching trains, and that he may ordinarily rely upon the invitation as an assurance of safety, and may assume that the movement of cars and trains over such crossing will be regulated with due regard to his safety. See *Glushing v. Sharp*, 96 N. Y. 676; *Palmer v. R. R. Co.*, 112 N. Y. 241, 19 N. E. 678; *French v. R. R. Co.*, 116 Mass. 537; *Sweeny v. R. R. Co.*, 92 Mass. 368, 87 Am. Dec. 644; *Sonier v. R. R. Co.*, 141 Mass. 10, 6 N. E. 84; *R. R. Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843, 10 Am. St. Rep. 136; *R. R. Co. v. Clough*, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184; *R. R. Co. v. Schneider*, 45 Ohio St. 678, 17 N. E. 321; *Terry v. Jewett*, 78 N. Y. 338.

In the *Sweeny* Case, *supra*, it was claimed that the company's agent gave the plaintiff a signal to cross the track, and the court says: "No express invitation need to have been shown. It would

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have been only necessary for the plaintiff to prove that the agent did some act to indicate that there was no risk of accident in attempting to pass over the crossing." In the Glushing Case the question was upon an implied invitation offered by an open crossing gate, and the court uses this language: "The raising of the gate was a substantial assurance to him of safety, just as significant as if the gateman had beckoned to him, or invited him to come on, and that any prudent man would not be influenced by it is against all human experience."

In *Hartzig v. R. R. Co.*, 154 Pa. 364, 26 Atl. 310, the plaintiff was acting under the direction of a brakeman in making her exit from a train, and was injured. The court there says: "In such circumstances she cannot be charged with contributory negligence for doing what she was told to do by the brakeman. She was still in the charge of the defendant company, and was therefore not a discharged passenger. She was using the means for alighting which were provided for her, and with the assistance of their agent." The same rule is affirmed in *Filer v. R. R. Co.*, 59 N. Y. 351. In *Jewett v. Klein*, 27 N. J. Eq. 550, the plaintiff, a passenger, was injured in crossing the track to take his train, and the court there uses language peculiarly applicable to the present case. It says: "The company had provided no way of approach to the passenger train, except by crossing on a level the eastern track of the railroad, and in my opinion the passenger was fully justified in concluding that he would be safe from harm from a train on the track which he was thus obliged to cross in order to secure his passage. The company had, in effect, assured him that he would at that time be safe in going in the usual way from the station to the passenger train. Acting upon such assurance, the plaintiff did no more or less than ordinarily prudent and careful persons do almost every day under like circumstances, and may be expected and have the right to do."

We quote also from the Michigan court: "Where passengers are at the appointed place for embarking, with no fences or gates to keep them back, they must generally have the right, if they do so in good faith, to assume that no dangerous orders will be given, and that they may safely act on the direction of those whose legal duty it is to protect them from risk, and who are supposed to know what is safe. Some allowance must also be made for such conditions as stand in the way of full deliberation. It is applying too harsh a rule to hold that persons, who have apparently few moments to decide between the direction of the officers and losing their last chance of passage, should be held negligent in doing as they are invited to do, unless the danger is very obvious." *Clinton v. Root*, 58 Mich. 182, 24 N. W. 667, 55 Am. Rep. 671; *Pool v. R. R. Co.*, 56 Wis. 236, 14 N. W. 46.

Very closely resembling the case at bar is *Warren v. Railroad*

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Company, 8 Allen (Mass.) 237, 85 Am. Dec. 700. There the plaintiff was required to cross the track to reach his train. While awaiting its arrival at the station, the agent announced, "The train is coming! We will cross over." Following this direction, plaintiff undertook to make the crossing, and was struck by a moving train, which he could have seen and avoided had he looked. Holding that he was not negligent as a matter of law, the court says: "Whether in this connection of things, in his anxiety to seasonably reach the train, which would stop but a moment, the plaintiff, at a station with which he was not familiar, would have been likely to be thrown off his guard by the direction to cross over, given without any caution or qualification, whether he might naturally, and without subjecting himself to the imputation of want of care, have considered himself in the charge of the defendant's agent, with an assurance that it was safe and proper to go directly to the cars, were questions for the jury, and not for the court."

It needs no argument to demonstrate the manifest application of these cases, and the law therein announced, to the case at bar. We further cite, without quotation, *Boesen v. R. R. Co.*, 79 Neb. 381, 112 N. W. 615; *R. R. Co. v. King*, 99 Fed. 251, 40 C. C. A. 432, 49 L. R. A. 102; *Warner v. Railroad*, 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491; *Betts v. Railroad*, 191 Pa. 580, 43 Atl. 362, 45 L. R. A. 261; *Graven v. McLeod*, 92 Fed. 851, 35 C. C. A. 47; *Railroad v. Lagerkrans*, 65 Neb. 566, 91 N. W. 358, 95 N. W. 2; *Railroad v. Goodin*, 62 N. J. Law, 394, 42 Atl. 333, 45 L. R. A. 671, 72 Am. St. Rep. 652. The only possible escape from this conclusion is for this court to say, as a matter of law, that the danger in making the crossing was so obvious that, as a man of ordinary prudence, the deceased should have refused to follow the agent to the platform. But when we stop to consider what such a holding would involve, it is very clear that we would be thereby invading the province of the jury. In the first place, as the cases hold, over and over again, the invitation was an assurance of safety held out by the defendant. It was given by the person whom the defendant had placed in charge of its station for that purpose. The deceased had a right to assume that the agent's knowledge, experience, and judgment as to the safety of the crossing was superior to his own. The jury could rightfully have found that, had the train not been moving at a negligently high rate of speed, deceased would have reached the platform in safety. The court is not in position to say that in the darkness of the night, and in his natural haste and anxiety to make the train, deceased ought to have discovered the excessive speed of the train approaching, and refused to attempt the crossing. Indeed, it is quite obvious that the agent himself, with all his experience, was deceived concerning the speed of the train, and was thereby misled to his own death. It is admitted

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that the train entered the station yard at the rate of at least 40 miles an hour, and was moving at the rate of 16 miles an hour when it reached the end of the platform. But how was the deceased to be held to a discovery of this negligence in time to have avoided injury? He had the undoubted right to assume that, the defendant company having so arranged its station as to require him to cross from the waiting room to the opposite side of the track in front of a train known to be approaching, it would so govern the movement of such train that the passenger rightfully availing himself of this means of access to the train upon which he was to be transported would not be unreasonably exposed to danger. He had to act quickly. If he would not lose his train, he could not stop to make a careful examination of his surroundings, or to enter upon deliberate calculation as to the degree of danger to be apprehended in going ahead. *Waldele v. R. R. Co.*, 4 App. Div. 549, 38 N. Y. Supp. 1009.

Indeed, if under such circumstances, the court is to hold the deceased guilty of contributory negligence as a matter of law, it would be exceedingly difficult to imagine a case in which that question may ever be submitted to a jury. It has never been held by any court that a person crossing a railway track with knowledge of an approaching train is, under all circumstances, negligent as a matter of law. That question depends entirely upon the relative distance of the person and the train from the crossing; and, if the train is so near, and moving at such a rate of speed that the traveler as a reasonably prudent person knows, or ought to know, that he cannot cross the track without exposing himself to a collision, then his attempt to do so is negligent. But if the train is at such distance that a reasonably prudent man may fairly believe that he can cross in safety, then the act is not negligent, and the question whether he is justified in so believing is, under all ordinary circumstances, for the jury. If he is a traveler at a public crossing, or a passenger waiting at the station to board the train, and the darkness of the night prevents his seeing the speed of the approaching train, he may rightfully assume that it is not being operated at an excessive or reckless pace, and that the approach will be made with due regard for his safety, and he is not negligent in governing his movements accordingly. If to the darkness of the night and to this reasonable presumption we add the presence of the railway company's agent pointing out the way, and directing him to cross, it would, as one of the authorities above cited says, be contrary to all human experience if even the most prudent traveler be not influenced by it.

In *Railway Co. v. Van Steinburg*, 17 Mich. 99, we have a case where the plaintiff, the keeper of a hotel located on the opposite side of the track from a station, after hearing the whistle of an approaching train, left his place of business to go to the station, and in attempting to make the crossing ahead of the train was

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struck and injured. The principal negligence charged against the railway company was in making the approach at an alleged reckless rate of speed. The case, as will be seen, was very much less favorable for the plaintiff than is presented by the case at bar. In an opinion by Chief Justice Cooley the question whether, under such circumstances, the plaintiff was chargeable with contributory negligence as a matter of law is considered with great fullness; and, after an elaborate review of the authorities, it is held to be a jury question. The discussion by the learned Chief Justice is worth careful examination by any court, when urged to dispose of questions of negligence and contributory negligence as matters of law, and we will prolong this opinion, already too extended, only to give his application of the law to the particular facts, which are in a great measure parallel with those we are not considering. He says: "It certainly cannot be said, on any view of the evidence, that the plaintiff observed the highest degree of prudence in his conduct. He stepped on the track on which he knew the train was approaching, without turning to see how near it was, and the injury has resulted in consequence. Thus stated, the fact would appear to be gross negligence, if not utter recklessness; but there are other circumstances to be taken into consideration before judgment can be pronounced upon the character of the act. The plaintiff heard the whistle a half a mile off. He knew he had the time, which would be required for the train to pass over that distance, in which to cross over to the depot, a distance of less than 100 feet. He also knew that all trains coming on this track stopped at the depot, and that they checked their speed and approached it slowly. He had also some reason to expect the ringing of the bell. But whether the bell was rung or not it may well be claimed he had abundant reason to believe there was ample time to cross the track before the train in the ordinary course could possibly arrive, even though he walked along leisurely as he must have done. He looked for the train, indeed, as he came out of his hotel, but he had less than the usual occasion for looking when he knew about how far off the train was, and that, relying upon the ordinary mode of management, as he had a right to, he could not be in danger from it in passing over, and, if we are to believe his evidence, he was entirely correct in his calculations, and it was only because the train came up at a speed twice as great as he had any right to anticipate that he found himself in danger. He may claim, therefore, that he was not guilty of want of ordinary care and prudence because the ordinary condition of things, which was what he was to look for, would not have made his position dangerous."

The case of *McIntyre v. R. R. Co.*, 37 N. Y. 287, is also so directly in point, and the discussion of the subject of contributory negligence in following the direction of the carrier's agent is so

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applicable to the circumstances now under consideration, that at the risk of seeming tedious we now quote therefrom. The passenger, laden with a handbox, bundle, basket, and flowerpot, and piloting her aged parent, also incumbered with baggage, undertook to pass from one car to another while the train was in motion, and the platforms slippery with sleet and ice, fell between the cars. She attempted to make the passage because the seats in the car were all filled, and the brakeman told her to go into the next car, where she would find room. In an opinion by Fullerton, J., it is said: "She had a right to a seat, and it was the duty of the defendant to provide her with one. If in discharging that duty they required her to perform an act which was perilous in itself, and in doing which she lost her life, the negligence, if any the act involved, should be imputed to the company alone. * * * I admit that passing from one car to another in a dark and stormy night, incumbered with baggage, and having charge of an aged person, was an act fraught with imminent peril, and, if done without sufficient reason, one involving great negligence. But, having been undertaken at the request of the company, it is to be regarded as their act, and attempted at their risk. Unless this view of the case is adopted, railroad companies may be guilty of the grossest wrongs without incurring liability."

The following precedents are worthy of note, not so much because of similarity of facts involved with these presented by the instant case, but for their discussion and elucidation of the law of negligence and contributory negligence in personal injury cases, and the limitation upon the authority of the court to dispose of such questions as matters of law: *Ernst v. R. R. Co.*, 35 N. Y. 9, 90 Am. Dec. 761; *Walker v. R. R. Co.*, 81 Minn. 404, 84 N. W. 222, 51 L. R. A. 632; *Benjamin v. R. R. Co.*, 160 Mass. 3, 35 N. E. 95, 39 Am. St. Rep. 446; *R. R. Co. v. Ogier*, 35 Pa. 72, 78 Am. Dec. 322; *Correll v. R. R. Co.*, 38 Iowa, 120, 18 Am. Rep. 22; *R. R. Co. v. Ives*, 144 U. S. 428, 12 Sup. Ct. 679, 36 L. Ed. 485; *R. R. Co. v. Prescott*, 59 Fed. 237, 8 C. C. A. 109, 23 L. R. A. 654; *Beisiegel v. R. R. Co.*, 34 N. Y. 633, 90 Am. Dec. 741; *Tilden v. R. R. Co.*, 27 R. I. 482, 63 Atl. 675; *R. R. Co. v. Winters*, 175 Ill. 293, 51 N. E. 901; *Bucher v. R. R. Co.*, 98 N. Y. 128; *Holden v. R. R. Co.*, 103 Minn. 98, 114 N. W. 365; *R. R. Co. v. White*, 88 Pa. 333; *R. R. Co. v. Shean*, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729.

The trial court erred in refusing to submit the case to the jury, and a new trial must be ordered.

Reversed.

PHILADELPHIA, B. & W. R. CO. *v.* DIFFENDAL.

(Court of Appeals of Maryland, Jan. 12, 1909.)

[72 Atl. Rep. 193.]

Carriers—Connecting Carriers—Injury to Fruit—Condition on Tender to Carrier.—In an action against a terminal carrier for injuries to peaches in transportation, evidence held sufficient to show that the fruit was delivered to the initial carrier in sound condition.

Carriers—Perishable Goods—Transportation—Carrier's Liability.*—While a carrier as to most commodities delivered to it for transportation is an insurer against all results incident to the transportation, except injuries resulting from act of God, a public enemy or the fault of the shipper, it is only liable for deterioration in perishable goods, in case of negligence in protecting the goods from injury while in its custody or in delivering them with dispatch to the consignee or connecting carrier.

Carriers—Connecting Carriers—Negligence—Presumption—Burden of Proof.†—Where goods are delivered to the initial carrier in good condition and are delivered to the consignee by the connecting and terminal carrier in bad condition, it will be presumed as against the terminal carrier, in the absence of contrary evidence, that the goods were received by it in the same condition they were delivered to the initial carrier.

Carriers—Connecting Carriers—Acceptance of Car—Character of Goods—Notice.—Where a connecting terminal carrier accepted a refrigerator car containing peaches, it had implied notice from the character of the car that the goods were perishable, so that by accepting the car it undertook to exercise reasonable diligence to protect the peaches and to deliver them to the consignee within a reasonable time.

Carriers—Connecting Carriers—Perishable Fruit—Re-icing Cars.—Failure of a connecting terminal carrier to properly re-ice a refrigerator car of peaches on accepting it for transportation to destination, and to deliver the peaches to the consignee in proper condition, created a liability against the carrier for the damages resulting therefrom.

Witnesses—Refreshing Recollection.—A witness, testifying as to the time when a car of peaches arrived at a connecting point and was delivered to the connecting and terminal carrier, was entitled to use

*See extensive note, 23 R. R. R. 176, 46 Am. & Eng. R. Cas., N. S., 176.

†See last foot-note of Winslow Bros. & Co. *v.* Atlantic Coast Line R. Co. (S. Car.), 28 R. R. R. 116, 51 Am. & Eng. R. Cas., N. S., 116; foot-note of Cooper *v.* Seaboard A. L. Ry. (S. Car.), 27 R. R. R. 128, 50 Am. & Eng. R. Cas., N. S., 128; first foot-note of St. Louis, etc., R. Co. *v.* McGivney (Okl.), 26 R. R. R. 702, 49 Am. & Eng. R. Cas., N. S., 702; last foot-note of St. Louis, etc., Ry. Co. *v.* Renfroe (Ark.), 26 R. R. R. 253, 49 Am. & Eng. R. Cas., N. S., 253.

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a record book kept by himself to refresh his recollection, though the book was not proper evidence to go to the jury.

Appeal and Error—Review—Harmless Error.—Error in permitting a record book kept by a witness and used by him to refresh his recollection to go to the jury as evidence was harmless, where the witness testified to the facts of his own knowledge independent of the record after refreshing his memory therefrom.

• **Carriers—Perishable Fruit—Damages—Market Price—Notice.**—In an action against a connecting terminal carrier for injuries to peaches shipped from Cavetown, Md., on Saturday, September 30, 1905, at 6 o'clock p. m., which did not arrive at destination until between 5 and 6 o'clock p. m. October 2d, and then in a damaged condition owing to the carrier's failure to re-ice the car, the market value of the peaches at destination on October 2d was the proper measure of damages though defendant had no notice that the peaches were intended for market on that day, or that by the exercise of due diligence the peaches could have been delivered in time for that market.

Carriers—Connecting Carriers—Delay—Damages.†—For breach of a connecting carrier's duty to deliver the freight at its destination within a reasonable time, such carrier is responsible for the loss sustained, whether by a falling in the market price of the goods, or by damages thereto, or by a combination of both causes.

Evidence—Judicial Notice—Transportation of Freight—Time.§—Courts may take judicial notice of the location of two important cities of the United States, as well as of the distance between them, and of the approximate length of time required to transport a car of freight from one to the other by the modern means of conveyance.

Appeal and Error—Instructions—Prejudice.—Where, in an action against a connecting carrier for damages to peaches, the amount of the verdict for plaintiff and the net amount received by him from the sale of the damaged fruit yielded only a trifle more than the minimum price he was to receive for them according to his original contract with the consignee, defendant was not prejudiced by the fact that an instruction for plaintiff on the measure of damages was not sufficiently explicit as to how the jury should ascertain the loss, within the rule that a judgment will not be reversed because of an erroneous instruction resulting in no injury to appellant.

†For the authorities in this series on the subjects of the measure and elements of damages recoverable for delay in transporting or delivering freight, see foot-note of *Southern Ry. Co. v. Coleman* (Ala.), 27 R. R. R. 153, 50 Am. & Eng. R. Cas., N. S., 153, where all those preceding it are collected; foot-note of *Conheim v. Chicago Great Western Ry. Co.* (Minn.), 30 R. R. R. 165, 53 Am. & Eng. R. Cas., N. S., 165.

§See first foot-note of *Paterson v. Missouri Pac. Ry. Co.* (Kan.), 29 R. R. R. 695, 52 Am. & Eng. R. Cas., N. S., 695; foot-note of *Alabama G. S. R. Co. v. Oregon Power Co.* (Miss.), 29 R. R. R. 680, 52 Am. & Eng. R. Cas., N. S., 680; last foot-note of *Funderburg v. Augusta & A. Ry. Co.* (S. Car.), 30 R. R. R. 281, 53 Am. & Eng. R. Cas., N. S., 281.

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Appeal from Circuit Court, Carroll County, James R. Brashears, Judge.

Action by George F. Diffendal against the Philadelphia, Baltimore & Washington Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The following are the plaintiff's granted prayers and the special and general exceptions taken thereto, referred to in the opinion.

"(1) The jury are instructed that if they find from the evidence that the plaintiff delivered to the Western Maryland Railroad Company at Cavetown, Md., on the 30th day of September, 1905, a car load of peaches belonging to the plaintiff, in good condition, packed in a refrigerator car, and consigned to J. A. Davis & Sons in Washington, D. C., and shall further find that said car load of peaches was carried over the line of the said Western Maryland Railroad to Baltimore, Md., and shall further find that said car of peaches was delivered by the said Western Maryland Railroad at Fulton Station, at said Baltimore, Md., to the defendant, a connecting carrier, running from Baltimore, Md., to Washington, D. C., and shall further find that said car of peaches was delivered by the defendant to the said J. A. Davis & Sons in Washington, D. C., in a damaged condition, then the jury are instructed that the presumption of law is that said peaches were damaged while in the possession of the defendant, and their verdict must be for the plaintiff, unless the jury shall find such damage was not caused either by the failure of the defendant to transport said car with all reasonable dispatch, or by its failure to use all reasonable care, diligence, and exertion to maintain continuous refrigerators in said car, or by its failure to take all reasonable precautions to protect said peaches from damage.

"(2) The jury are instructed that if, under the pleadings and evidence in this case, they shall find that on the 30th day of September, 1905, at Cavetown, Md., the plaintiff delivered to the Western Maryland Railroad Company a car load of peaches belonging to the plaintiff in good condition, in what is commonly known as a refrigerator car to be carried from said Cavetown, Md., over the said company's line and connecting line or lines and delivered to J. A. Davis & Sons in Washington, D. C., and shall further find that said car load of peaches was transported over the line of the Philadelphia, Baltimore & Washington Railroad Company, a connecting carrier running from Baltimore, Md., to Washington, D. C., then, if the jury so find, they are instructed that it thereupon became the duty of the defendant, the Philadelphia, Baltimore & Washington Railroad Company, to use all reasonable care, diligence, and exertion to maintain continuous refrigeration in said car by keeping a sufficient quantity of ice in the bunkers of said car for that purpose

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and to re-ice as often as was necessary to maintain said refrigeration, and if the jury shall further find that the said defendant did not use all reasonable care, diligence, and exertion to maintain continuous refrigeration in said car according to its duty as above set forth, and failed to take all reasonable precaution to protect said peaches from the effect of the heat, and further find that by reason of the defendant's failure to use the aforesaid care, diligence, and exertion, and to take the aforesaid precaution, said peaches were damaged and were delivered by the defendant to said J. A. Davis & Sons in Washington, D. C., in such damaged condition, and the plaintiff sustained loss thereby, then, if the jury so find, their verdict must be for the plaintiff.

"(3) The jury are instructed that if, under the pleadings and evidence in this case, they shall find that on the 30th day of September, 1905, at Cavetown, Md., the plaintiff delivered to the Western Maryland Railroad Company a car load of peaches belonging to the plaintiff in good condition loaded in a refrigerator car to be carried from said Cavetown, Md., over the said company's line and connecting line or lines, and delivered to said J. A. Davis & Sons in Washington, D. C., and further find that said car load of peaches was transported over the line of the defendant in this case, the Philadelphia, Baltimore & Washington Railroad Company, a connecting carrier running from Baltimore, Md., to Washington, D. C., and that said car load of peaches was delivered to J. A. Davis & Sons in Washington, D. C., by the defendant in a damaged condition, then, if the jury so find, they are instructed that the burden is on the defendant to show that the damaged condition of said peaches was not caused by its failure to carry said peaches to the said J. A. Davis & Sons in Washington, D. C., with all reasonable dispatch, or by its failure to use all reasonable care, diligence, and exertion to maintain continuous refrigeration in said car, or by its failure to take all reasonable precaution to protect said peaches from damage."

"(5) The jury are instructed that if they find for the plaintiff they shall allow the plaintiff a sum equal to the difference between that which they find would have been the market value of said peaches in Washington, D. C. (if they had reached J. A. Davis & Sons in the same condition in which the jury find they were delivered to the Western Maryland Railroad Company at Cavetown, Md.), and that which the jury find was the market value of said peaches in their damaged condition, if the jury shall find such damage, and they may allow interest in their discretion on said sum from the time the peaches were delivered to J. A. Davis & Sons to the time of trial."

The defendant, by its counsel, specially excepts to the granting of the first, second, third, fourth, and fifth prayers of the plaintiff, and assigns therefor the following reasons:

"(1) Because there is no evidence in the case legally sufficient

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from which the jury can find under the plaintiff's first prayer: (a) That the car load of peaches was delivered in good condition to the Western Maryland Railroad Company at Cavetown; or (b) that said car load of peaches was delivered by the Western Maryland Railroad at Fulton Station, Baltimore, Md., to the defendant; or (c) that the defendant was a connecting carrier with said Western Maryland Railroad and ran from Baltimore, Md., to Washington, D. C.; or (d) that the defendant failed to transport said car load of peaches with all reasonable dispatch; or (e) that the defendant undertook to maintain continuous refrigeration in said car; or (f) that the damages to said peaches were caused by the failure of the defendant to take all reasonable precautions to protect said peaches from damage; or (g) that said car load of peaches belonged to the plaintiff. (Overruled.)

"(2) Because there is no evidence in this case legally sufficient from which the jury can find, as respects the plaintiff's second prayer: (a) That the plaintiff delivered to the Western Maryland Railroad Company at Cavetown, September 30, 1905, a car load of peaches belonging to the plaintiff in good condition to be carried from Cavetown, Md., over said company's line and connecting line or lines and delivered to J. A. Davis & Sons, Washington, D. C.; (b) that the Philadelphia, Baltimore & Washington Railroad Company is a connecting carrier running from Baltimore, Md., to Washington, D. C.; (c) that the defendant did not use all reasonable care, diligence, and exertion to maintain continuous refrigeration in said car according to its duty as above set forth; (d) that the defendant failed to take all reasonable precaution to protect said peaches from the effect of the heat; (e) that by the reason of the defendant's failure to use aforesaid care, diligence, and exertion, and to take aforesaid precaution, said peaches were damaged and were delivered by the defendant to the said J. A. Davis & Sons in Washington, D. C., in such damaged condition that the plaintiff sustained loss thereby. (Overruled.)

"(3) Because there is no evidence in the cause legally sufficient from which the jury can find under plaintiff's third prayer: (a) That the car load of peaches was delivered to the Western Maryland Railroad Company in good condition; (b) or that said car load of peaches was to be carried from Cavetown, Md., over the line of the Western Maryland Railroad Company, and connecting line or lines, and delivered to said J. A. Davis & Sons in Washington, D. C.; (c) or that said car load of peaches was transported over the line of the defendant; (d) or that the defendant was a connecting carrier running from Baltimore, Md., to Washington, D. C.; (e) or that said car load of peaches belonged to the plaintiff; or (f) that the defendant was guilty of any want of any care, diligence, and exertion whatsoever in the

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transportation and protection from damage of any peaches belonging to the plaintiff. (Overruled.)"

"(5) Because there is no evidence in this case legally sufficient from which the jury can find, as respects the plaintiff's fifth prayer, the following facts: (a) What would have been the market value of said peaches in Washington, D. C., if they had reached J. A. Davis & Sons in the same condition in which they were delivered to the Western Maryland Railroad Company; (b) in what condition the peaches were when delivered to the Western Maryland Railroad Company; or (c) what the market value was of said peaches in their damaged condition. (Overruled.)"

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

Shirley Carter, for appellant.

Levin Stonebraker and *Harvey R. Spessard*, for appellee.

WORTHINGTON, J. This suit was instituted by the appellee, George F. Diffendal, against the appellant, the Philadelphia, Baltimore & Washington Railroad Company, to recover damages for the injury which the plaintiff claims to have sustained by reason of the alleged negligence of the defendant in the transportation of a car load of peaches from Baltimore, Md., to Washington, in the District of Columbia. The plaintiff having obtained a verdict and judgment in the trial court for \$608, the defendant has brought this appeal to correct certain alleged errors in the rulings of that court.

At the trial of the case in the lower court the defendant offered no evidence whatever in defense of the action, but relied upon what it contends was a failure of proof, on the part of the plaintiff, to sustain the action. The principal ground of this contention is that the burden is upon the plaintiff to show by direct testimony that the peaches were delivered to the defendant carrier in good condition. It is not disputed that, if this fact had been proven, and also that they had been delivered to the consignee at the end of the route in a damaged condition, a *prima facie* case would have been made out against the defendant; but it is insisted that, until proof of delivery to the defendant carrier in sound condition is affirmatively shown, the defendant is not called upon to offer evidence in its own defense. In support of this contention defendant cites the cases of *Marquette*, etc., R. R. Co. v. *Kirkwood*, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453; *Darling v. Railroad*, 11 Allen (Mass.) 295, and some others. The important facts shown by the plaintiff's evidence are substantially as follows: The appellee is the owner of a peach orchard located near Cavetown, in Washington county, Md., along the line of the Western Maryland Railroad. On Saturday, September 30, 1905, he caused to be picked and loaded

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on a refrigerator car standing on a siding of the said railroad at Cavetown, the car having been previously placed there for his use, 483 carriers and 126 baskets of peaches of the Salway variety. A carrier is a crate holding six small baskets of peaches. The car load of peaches was consigned to John A. Davis & Sons, commission merchants, Washington, D. C. No price had been agreed on for the peaches; but the price of \$1.50 net was guaranteed by Davis, over the telephone, for the carrier peaches, and more if the market would afford it. No price whatever was mentioned for the basket peaches, but the plaintiff testified that they would bring him 75 cents a basket. That the peaches were carefully picked and handled is shown by the evidence. The loading of the car was finished about 6 o'clock Saturday evening, September 30, 1905, and at that time the ice bunkers in the car were full of ice. The trapdoors on top of the car through which the ice was put into the bunkers were tight, and it was a first-class dairy refrigerator car. The carrier peaches were of first grade, highly colored, round, and perfect. The peaches in the baskets were just as good as those in the carriers, but not so highly colored. The plaintiff received no bill of lading from the Western Maryland Railroad Company at the time the goods were shipped, but a card waybill was tacked on the car. Subsequently, when plaintiff wanted to file his claim for damages, he obtained a bill of lading from the Western Maryland Railroad which he delivered back to that company when he filed his claim. The contents of neither the card waybill nor the bill of lading were introduced in evidence. Just at what hour the car left Cavetown over the Western Maryland Railroad does not appear, but it was shown by the witness Hugh Scott that the car was received at Fulton Station, Baltimore, on Sunday morning, October 1, 1905, at 6:30 o'clock, and delivered to the defendant at 8:30; the Western Maryland Railroad being the initial carrier from Cavetown to Baltimore, and the defendant the connecting and terminal one from Baltimore to Washington. Lishear, a witness for the plaintiff, testified that he lived in Washington, that he was in the express business and did hauling for Mr. Davis, the consignee, that Mr. Davis notified him on Saturday evening that he would have a car load of peaches coming in on Sunday, and for the witness to look out for them. Witness looked for them on Sunday and also on Monday. He looked for them half a dozen times. The peaches finally came in over the defendant's line on October 2, 1905, between 5 and 6 o'clock in the evening. Witness further testified that after he found them he and Davis looked at the peaches, and the top layer was pretty rotten, and there was no ice in the bunkers. Davis, the consignee, testified that he knew the peaches were coming in through a couple of telegrams he received. When he finally discovered that the peaches had arrived—that is, on Monday evening between 5 and 6 o'clock

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—he went over to the car, looked into the bunkers, and found no ice in them. He opened the car, and it was very hot. The peaches in the top row were very bad. Further down the peaches were better. He immediately ordered ice to be put into the bunkers. The next morning he started to sell the peaches and sold them to the best advantage. He finished selling them on the 6th. He further testified that peaches would keep in a refrigerator car, if well iced, as long as 10 days. After the peaches are in the car, if the ice goes, the effect is worse than if they had been out in the sun. He received \$511.76 gross for the fruit, and after deducting freight and commissions, the net proceeds were \$373.63. That on Monday, October 2, 1905, peaches like plaintiff's sold in Washington at \$2.25 per carrier, and \$1 to \$1.50 per basket.

We think there was evidence legally sufficient from which the jury could find that the peaches were placed in the car at Cavetown in good condition, that the car was a good refrigerator car, and that the ice bunkers were filled with ice on Saturday evening at 6 o'clock, when the loading of the peaches was completed. The finding of these facts was, under the circumstances, equivalent to explicit proof that the fruit was delivered to the initial carrier in sound condition. The ordinary common-law liability of a common carrier as to most commodities committed to its custody for transportation is that of an insurer against all risks incident to the transportation, save such as result from the act of God or the public enemy, or the fault of the shipper; but with respect to perishable goods, which themselves contain the elements of destruction occasioning their own loss or deterioration, the carrier is not an insurer, but is required to exercise reasonable care and diligence to protect the goods from injury while in its custody, as well as to deliver them with dispatch to the consignee or connecting carrier. *Hutchinson on Carriers*, §§ 652, 334; *Brennisen v. Pa. R. R. Co.*, 100 Minn. 102, 110 N. W. 362. Where goods are transported by two or more successive carriers, it is the prevailing doctrine in this country that if it be shown that the goods were delivered to the initial carrier in good condition, and that they were subsequently delivered to the consignee by the connecting and terminal carrier in bad condition, the presumption of law is, when such last-named carrier is made defendant, that the goods were received by such carrier in the same condition they were delivered to the initial carrier, and the burden is upon the defendant carrier of proving that such goods came to its possession in a damaged condition, by way of defense. *Laughlin v. C. & N. W. Ry. Co.*, 28 Wis. 204, 9 Am. Rep. 493; *Savannah, etc., Ry. Co. v. Harris*, 26 Fla. 148, 7 South. 544, 23 Am. St. Rep. 551; *Penn. R. R. v. Naive*, 112 Tenn. 239, 79 S. W. 130, 64 L. R. A. 443; *Beard v. Ill. Central*, 79 Iowa, 527, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381; *Cane Hill & Co. v.*

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San Antonio Ry. Co. (Tex. Civ. App.), 95 S. W. 751; Elliott on Railroads, § 1450; 3 Hutchinson on Carriers, § 1348.

The reason of the rule, or rather the reason for the exception to the general rule, is that, when a shipper consigns his goods to a line of connecting carriers to be carried to the point of destination, he of course loses all sight of or control over them. From that time forward they are committed to the custody and management of the initial and connecting carriers, and these latter may each in turn, by the exercise of reasonable caution, ascertain the condition of the goods at the time of accepting them from the last preceding carrier, and thus in case of loss be able to prove where the loss occurred; whereas, the shipper has no means whatever of obtaining the necessary information, or witnesses to prove his case, except by summoning the employees of the carriers whose own negligence has caused the loss. One great difficulty that he would encounter in pursuing this course would be to discover which of the defendant's employees had knowledge of the facts. Should he be able to discover these, it would still be dangerous for the shipper to rest his case upon their testimony, since the natural impulse of mankind would be likely to sway them, in narrating the circumstances to state the occurrence in the light most favorable to themselves, in order to palliate their fault. Chicago, etc., R. R. Co. v. Moss, 60 Miss. 1003, 45 Am. Rep. 428. In Orem Fruit Company v. N. C. Ry. Co., 106 Md. 4, 66 Atl. 436, this court cited with approval Meredith v. Railroad Co., 137 N. C. 479, 50 S. E. 1, to the effect that, "on proof that a carrier received the goods in good condition, the burden of proof rests on such carrier to show delivery in the same condition to the next carrier, or to the consignee; such proof being within its power." In that case the initial carrier was sued jointly with one of several connecting and intermediate carriers, and this court was discussing the question with respect to the burden of proof as applied to the initial carrier as a defendant, under a special contract to re-ice the car at certain designated places, which the defendant had failed to do. 6 Cyc. 479. Mich. Central v. Myrick, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325. In Gwyn Harper Mfg. Co. v. Carolina Central R. Co., 128 N. C. 280, 38 S. E. 894, 83 Am. St. Rep. 675, the court said: "This court has repeatedly held that, among connecting lines of common carriers, the one in whose hands the goods are found damaged is presumed to have caused the damage, and the burden is upon it to rebut the presumption." In Cane Hill, etc., v. San Antonio Ry. Co. (Tex. Civ. App.), 95 S. W. 751, it was held that: "Where goods are delivered to a common carrier to be carried by a series of connecting lines to the point of destination, and the goods are delivered in a damaged condition to the consignee, a *prima facie* case is made out against the terminal carrier alone." In Shriver v.

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Railroad, 24 Minn. 506, 31 Am. Rep. 353, the court said: "Where goods are delivered to be transported over a line composed of several connecting carriers, it will, in the absense of anything to the contrary, be presumed that they reached the last carrier in the same condition in which they were delivered to the first." Any apparent difference of opinion in regard to the application of the rule, as shown by the foregoing expressions of the courts, is explained by an examination of the facts of each case. It was said in the case of *Meredith v. Seaboard Air Line Ry.*, cited in *Orem Fruit Co.'s Case*, *supra*: "The same reason which requires the last carrier to show performance of duty applies with equal force to the first—that the source or means of proving the exculpatory facts are peculiarly within its knowledge and not otherwise open to the plaintiff." This is the controlling principal governing the application of the doctrine, and the doctrine itself rests upon grounds of general convenience and public policy, and places no unreasonable burden on the defendant carrier. *Brennisen's Case*, 100 Minn. 102, 110 N. W. 362; *Chicago v. Moss*, 60 Miss. 1003, 45 Am. Rep. 428. In this case, when the defendant carrier accepted the refrigerator car containing the peaches, it had implied notice, from the character of the car itself, that the goods in the car were of a perishable nature, and by accepting the car the carrier undertook the duty of exercising due care and diligence to protect the goods and to deliver them at their destination within a reasonable time. *Elliott on Railroads*, §§ 1449, 1475; *New York Ry. Co. v. Cromwell*, 98 Va. 227, 35 S. E. 444, 49 L. R. A. 462, 81 Am. St. Rep. 722; *Beard v. Railway Co.*, 79 Iowa, 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381; 1 *Hutchinson on Carriers*, § 334. Failure to properly ice the car, or to deliver the same properly to the consignee at Washington, would be such default on the part of the carrier as to render it liable for damages resulting thereby to the fruit. *Brennisen's Case*, *supra*. If the defendant desired to ascertain the condition of the fruit or of the ice tanks at the time the car was delivered to it at Fulton Station, it had ample opportunity through its agents and servants to do so, and, if it could show that the fruit was then in a damaged condition, such evidence would tend to exonerate it from blame. But the defendant offered no evidence whatever, and the plaintiff's evidence was clear that, when the car reached Washington late on Monday evening, there was no ice in the bunkers, and on opening the car it was found to be very hot inside; the peaches at the top of the car being badly damaged. We are unable to accept the doctrine of the cases cited by defendant in support of its contention in this respect, and under the circumstances of the case, as presented by the record, we must hold that the burden was upon the defendant to show that those conditions were due to no neglect or default on its part. The first and principal contention of the defendant cannot therefore be sustained.

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2. It was also contended by defendant's counsel that the evidence of Hugh Scott, a witness for the plaintiff, as to the time when the car load of peaches arrived at Baltimore, and was there, at Fulton Station, delivered to the defendant, was not admissible, because witness read in part from a record book kept by himself. So far as the witness used the book to refresh his recollection, merely, his testimony was competent, but the book itself was not proper evidence to go to the jury under the circumstances. The error in this respect was, however, harmless, as the witness testified that of his own knowledge, independent of the record, after refreshing his memory thereon, the car came into Fulton Station at 6:30 on Sunday morning, and that it was delivered to defendant at 8:20. He omitted to say whether the delivery was made at 8:20 a. m. or 8:20 p. m., but under the circumstances we do not consider this omission fatal to the plaintiff's case. As the witness had just stated that the car came in at 6:30 in the morning, the jury may very properly have inferred that the hour of 8:20, named by him as the time when the car was delivered to the defendant, had reference to the morning also; but, even if not delivered to defendant until 8:20 p. m., the burden would still be upon the defendant to show that the peaches were then in a damaged condition in order to exculpate itself from blame.

3. The defendant's third exception is to the ruling of the court admitting the evidence of the witness Davis in regard to the market value of first-grade Salway peaches, on the Washington market, on Monday October 2, 1905. The ground of this exception is that there was no evidence in the case to show that the defendant had notice that the peaches were intended for Monday's market, and no evidence that it could by the exercise of due diligence have delivered the peaches at their destination in time for the market of that day. Under the circumstances of this case, we do not deem it essential that the plaintiff should have affirmatively proved that the defendant had actual notice that the freight was intended for Monday's market. It became the implied duty of the defendant, in accepting the car load of fruit for transportation, to use due diligence to deliver the same at its destination within a reasonable time (Hutchinson on Carriers, § 652); and for a breach of this duty, resulting in loss to the plaintiff, the defendant was responsible in damages, whether the loss was occasioned by a fall in the market prices, or by damage to the goods themselves, or by a combination of the two causes. It was so held in *Collard v. Railway Co.*, 7 H. & N. 79. Besides, the defendant had such notice as may be reasonably inferred from the circumstances of the case and the course of business. *B. & O. R. R. Co. v. Whitehill*, 104 Md. 311, 64 Atl. 1033. As to the exercise of due diligence on the part of the defendant, in the absence of direct proof, the court may take judicial notice of the location of two such large and important cities as Baltimore and

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Washington, as well as of the distance between them, and of the approximate length of time required to transport a car load of goods from one city to the other by the modern means of conveyance. 16 Cyc. 863. The lower court no doubt took such notice and deemed it entirely feasible for the defendant to have carried the car from Baltimore to Washington in time for Monday's market, and as the defendant has failed to offer any exculpatory evidence whatever on its part, we are not prepared to say that the lower court committed error in allowing the evidence to go to the jury.

4. What we have said practically disposes of the special and general exceptions to the granting of all plaintiff's granted prayers, which we will ask the reporter to set out in his report of this case. The plaintiff's fifth prayer, concerning the measure of damages, ought to have been more explicit as to the manner in which the jury should ascertain the amount of plaintiff's loss; but it is apparent that the defendant was not injured by this defect. It was understood before the peaches were shipped from Cavetown that the plaintiff was to have \$1.50 net per carrier for the peaches in carriers, and more if the market would afford it. The plaintiff also testified that the basket peaches were worth 75 cents per basket, to him. The sum allowed by the jury to the plaintiff, added to the net amount received by him from the sale of the damaged fruit, only yielded him, in the aggregate, 75 cents per basket for the basket peaches, and \$1.67 per carrier for the carrier peaches, with interest, or but a trifle more per crate than the minimum price he was to receive for them according to his original understanding with the consignee. The plaintiff was entitled to be compensated to the extent of his loss, and we cannot see that the jury was misled by the instructions as granted. Where an erroneous instruction results in no injury to the appellant, this court will not reverse the judgment. *B. & O. R. R. Co. v. Pumphrey*, 59 Md. 402.

Finding no reversible error in the rulings of the lower court, the judgment will be affirmed.

Judgment affirmed, with costs.

SOUTHERN RAILWAY COMPANY, Plff. in Err. v. ST. LOUIS HAY & GRAIN COMPANY.

(Argued March 8, 9, 1909. Decided June 1, 1909.)

[29 Sup. Ct. Rep. 678.]

Carriers—Charges for Permitting Reconsignment.—A railway carrier is entitled to some compensation in addition to the actual cost involved in taking loaded cars in transit to the shipper's warehouses at an intermediate point for unloading, inspection, and reloading, and taking away the reloaded cars, whether or not the carrier is under any obligation to extend such a privilege to shippers.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Illinois for the recovery of an award of the Interstate Commerce Commission in favor of a shipper, based upon the payment of an alleged unreasonable and excessive charge for permitting a reconsignment. Reversed and remanded with instructions to remit the proceedings to the Interstate Commerce Commission for further investigation.

See same case below, 82 C. C. A. 614, 153 Fed. 728.

Statement By MR. JUSTICE BREWER:

This was an action brought by the defendant in error on an award of the Interstate Commerce Commission. In a general way, the facts are as follows: The St. Louis Hay & Grain Company is a corporation organized under the laws of the state of Illinois, with its principal office at St. Louis, Missouri, a dealer in hay, in the course of which business it operates two warehouses in East St. Louis, Illinois. The railway company is the owner and operating a line of railway extending from East St. Louis through the eastern district of Illinois to points in Southern states, to which the hay and grain company is engaged in shipping hay. The company buys some hay at its warehouses, brought in from the adjacent country, but a large portion of it is bought at points to the north and west. Some of the hay thus purchased is sent directly through East St. Louis in the cars in which it was originally loaded, but much of it is taken to its warehouses, there unloaded, inspected, and reloaded for the Southern markets. This is called a reconsignment. Taking these cars which are to be reconsigned to the hay and grain company's warehouses, and taking the reloaded cars therefrom, involves the use of the cars for a longer time, and there is some expense in hauling the cars. For this the railway company had been in the habit of charging \$4 or \$5 a car, equivalent on the average loading to 2 cents per hundred pounds. On an application by the company to the Interstate Commerce Commission it was held, on May 15, 1905 (11

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Inters. Com. Rep. 90), that such charge was an excessive and unreasonable charge, and that one half thereof was sufficient. Upon that basis it awarded to the hay and grain company the sum of \$1,572.08, one half the sum paid theretofore by it to the railway company. This sum not being paid, the hay and grain company, on January 23, 1906, filed its petition in the United States Circuit Court for the eastern district of Illinois to recover the amount thus awarded, with interest, and also for an attorney's fee. A trial resulted on June 25, 1906, in a judgment in favor of the hay and grain company for the amount awarded by the Commission, with interest thereon, and also for \$350 as an attorney's fee. 149 Fed. 609. On error to the United States circuit court of appeals for the seventh circuit the judgment of the circuit court was, on April 16, 1907, affirmed (82 C. C. A. 614, 153 Fed. 728), whereupon the case was brought here on error.

Messrs. *Claudian B. Northrop* and *Edward C. Kramer*, for plaintiff in error.

Messrs. *P. J. Farrell* and *L. O. Whitnel* for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court:

This case rests on the findings and conclusion of the Interstate Commerce Commission; for while, on the trial in the circuit court, testimony in addition to that which was produced before the Commission was received, yet the finding of the court was that, "from all the evidence heard and adduced on the trial of this cause in this court, the court finds that the said findings of fact by the said Interstate Commerce Commission are supported and justified by the said evidence, and it is ordered that the said findings of fact, as above recited and set out, be and the same are adopted as the special findings of fact of the court, and that the same be set out in the records of this court accordingly."

Nothing was, of course, added in the circuit court of appeals, which merely affirmed the judgment of the circuit court. We turn, therefore, to the proceedings before the Commission, and there is this finding of fact:

"While the question is perplexing, and while we may not have apprehended all the material points involved, we are strongly of the opinion and find that, taking everything into account, the average additional expense to southern lines in case of reconsigned hay will not exceed that of direct through shipments by more than from \$2 to \$2.50 per car, which is equivalent upon the average loading of hay to about 1 cent per hundred pounds."

The conclusions, so far as material to this controversy, are thus stated:

"The stopping of a commodity in transit for the purpose of treatment or reconsignment is in the nature of special privilege which the carrier may concede, but which the shipper cannot,

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in the present state of the law, demand as a matter of lawful right. *Diamond Mills v. Boston & M. R. Co.*, 9 Inters. Com. Rep. 311. Carriers may not, however, discriminate between markets nor between individuals in the granting of such privileges. If this right is given to the markets which compete with East St. Louis in this business by these defendants, it should, *prima facie*, also be granted to that market. If these defendants allow this privilege to the competitors of the complainant at East St. Louis, they should accord it the same privilege.

"The case shows, although not very clearly, that the defendants concede this privilege at other competing markets, and that a track buyer in East St. Louis itself can send along a car load, which he purchases, but does not unload, without the payment of this charge. It further shows, however, that the right to unload this hay and handle it at its warehouse is of value to the complainant, and that it costs these defendants something to accord that privilege.

"Under these circumstances, we think it is not an undue preference against the complainant if the railroads charge for the privilege what it actually costs them, but we do not think that they should charge more than the actual cost. The case finds that the fair average cost when the complainant handles its hay through its warehouse, over and above the cost of a through shipment, is from \$2 to \$2.50 per car, or approximately 1 cent per hundred pounds. We think, therefore, that this reconsignment charge ought not to exceed the proportional rate by more than one cent, and that the complainant is entitled to recover whatever it has paid in addition to that sum."

It thus appears that the Commission was of the opinion that the shipper could not demand, as a matter of right, the stopping of the hay for the purposes of treatment or reconsignment unless the same privilege was given to other shippers; and that, in granting this privilege, the railway company could only charge the shipper the actual cost. But this privilege involved to the railway company the cost of hauling to and from the warehouses and the use of the car for some hours, perhaps days. The commission found that \$2 or \$2.50 per car, or approximately 1 cent per hundred pounds, was the actual cost to the railway company.

We are unable to concur with the Commission. If the stopping for inspection and reloading is of some benefit to the shipper and involves some service by and expense to the railway company, we do not think that the latter is limited to the actual cost of the privilege. It is justified in receiving some compensation in addition thereto. A carrier may be under no obligations to furnish sleeping or other accommodations to its passengers, but, if it does so, it is not limited in its charges to the mere cost, but may rightfully make a reasonable profit out of that which it does furnish. Especially is this true when, as here, the privilege

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is in no sense a part of the transportation, but outside thereof. Whether the conclusion of the Commission that the carrier is under no obligations to permit the interruption of the transit is right, and whether it is or is not under such obligation, it is entitled to receive some compensation beyond the mere cost for that which it does.

We have been particular to copy the exact language used by the Commission, for, in another case between the same plaintiff and other railroad companies, involving the charges in a case of reconsignment of hay, decided on December 20 of the same year (St. Louis Hay & Grain Co. v. Illinois C. R. Co., 11 Inters. Com. Rep. 486), the Commission made an order dismissing the complaint. It is true that the facts are not precisely like those in this case, but, at the same time, the difference in the conclusions of the Commission is such as seem to suggest that perhaps, on further examination, the Commission had come to a different conclusion.

The testimony taken before the Commission is not preserved in the record, hence it would be impossible, even if proper, with all the testimony before us, to fix the amount which would be a fair and reasonable charge. All we can do is to reverse the judgments of the Circuit Court and Circuit Court of Appeals, and remand the case to the former court with instructions to send the matter back to the Commerce Commission for further investigation and report.

Reversed.

UNITED STATES, *ex rel.*, ATTORNEY GENERAL OF THE UNITED STATES, Plff. in Err. *v.* DELAWARE & HUDSON COMPANY.

SAME *v.* ERIE RAILROAD COMPANY.

SAME *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY.

SAME *v.* DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY.

SAME *v.* PENNSYLVANIA RAILROAD COMPANY.

SAME *v.* LEHIGH VALLEY RAILROAD COMPANY.

UNITED STATES, Appt. *v.* DELAWARE & HUDSON COMPANY.

SAME *v.* ERIE RAILROAD COMPANY.

SAME *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY.

SAME *v.* DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY.

SAME *v.* PENNSYLVANIA RAILROAD COMPANY.

SAME *v.* LEHIGH VALLEY RAILROAD COMPANY.

(Argued January 19, 20, 1909, Decided May 3, 1909.)

[29 Sup. Ct. Rep. 527.]

Constitutional Law—Determination of Constitutional Questions—Statutes—Construction—Favoring Constitutionality.—In construing a statute reasonably susceptible of two interpretations, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, it is the court's duty to adopt the latter interpretation.

Carriers—Governmental Control—Association with Commodity Carried.—The dissociation of railway companies prior to transportation from the articles or commodities transported, whether such association results from manufacture, mining, production, or ownership, or interest, direct or indirect, is the common purpose of the provisions of the Hepburn act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892), making it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect."

Carriers—Governmental Control—Association with Commodity Carried.—Transportation when the thing to be transported has been manufactured, mined, or produced by the carrier or under its authority, and at the time of transportation the carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the thing to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense, is all that is forbidden by the provisions of the Hepburn act of June 29, 1906, making it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined, or produced by it or under its authority, or which it may own in whole

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or in part, or in which it may have any interest, direct or indirect."

Carriers—Governmental Control—Interest in Commodity Carried—Stock Ownership.—The ownership by a railway carrier of stock in a bona fide corporation manufacturing, mining, producing, or owning the commodity carried is not the "interest, direct, or indirect," in such commodity, forbidden to the carrier by the Hepburn act of June 29, 1906, but such words are to be taken as embracing only a legal or equitable interest in the commodities to which they refer.

Commerce—Regulation of Interstate Carrier—Association with Commodity Carried.—Congress could properly enact, as a regulation of commerce, so much of the Hepburn act of June 29, 1906, as forbids a railway carrier from transporting articles or commodities in interstate commerce when such article or commodity has been manufactured, mined, or produced by the carrier, or under its authority, and, at the time of transportation, such carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the article or commodity to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense, although, by existing state legislation, such carrier may have a lawful right of ownership of or association with the articles or commodities upon which these provisions operate.

Constitutional Law—Due Process of Law—Governmental Regulation of Carrier.—Railway companies enjoying the right, under existing state legislation, of ownership or of association with the articles or commodities carried, are not denied the due process of law guaranteed by U. S. Const. 5th Amend. by so much of the provisions of the Hepburn act of June 29, 1906, as forbids a railway carrier from transporting articles or commodities in interstate commerce when such article or commodity has been manufactured, mined, or produced by the carrier or under its authority, and, at the time of transportation, such carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the article or commodity to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense.

Carriers—Congressional Regulation—Discrimination.—The exception in favor of timber and manufactured products thereof, contained in the provisions of the Hepburn act of June 29, 1906, forbidding railway carriers from transporting in interstate commerce articles or commodities with which they are associated, or in which they are interested, does not render the statute invalid for discrimination.

Constitutional Law—Determination of Constitutional Questions—When Validity May Be Assailed.—The Federal Supreme Court, will not consider the question of the constitutionality of the clause of the Hepburn act of June 29, 1906, imposing penalties for violations of its provisions forbidding railway carriers from transporting in interstate commerce commodities with which they are associated or in which

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they are interested, in an action seeking to enforce such provisions by injunction or mandamus, in which no recovery of penalties is sought.

Statutes—Invalid in Part.—The possible invalidity of the clause of the Hepburn act of June 29, 1906, imposing penalties for violations of its provisions forbidding railway carriers from transporting in interstate commerce commodities with which they are associated, or in which they are interested cannot affect the validity of these provisions, since the penalty clause is wholly separable therefrom.

Carriers—Governmental Regulation—What is a "Railway Company."—The Delaware & Hudson company, chartered to secure coal lands and mine coal, and to construct a canal and railroad for the purpose of transporting the products of its mines, being also engaged as a carrier by rail in the transportation of coal in the channels of interstate commerce, is a "railroad company" within the meaning of the Hepburn act of June 29, 1906, prohibiting such companies from transporting in interstate commerce commodities with which they are associated, or in which they are interested.

Six Writs of Error to the Circuit Court of the United States for the Eastern District of Pennsylvania to review judgments denying mandamus to compel certain railway carriers to refrain from interstate transportation of coal from the Pennsylvania anthracite regions. Reversed and remanded for further proceedings. Also Six Appeals from the Circuit Court of the United States for the Eastern District of Pennsylvania to review decrees dismissing bills in equity seeking to accomplish the same result by injunction. Reversed and remanded for further proceedings.

See same case below, 164 Fed. 215.

The facts are stated in the opinion.

Attorney General *Bonaparte*, Solicitor General *Hoyt*, and Messrs. *L. Allison Wilmer* and *Thomas C. Spelling*, for plaintiff in error and appellant.

Messrs. *John C. Johnson* and *Robert W. de Forest*, for defendants in error and appellees.

Messrs. *Walker D. Hines*, *James M. Beck*, and *William S. Opdyke*, for the Delaware & Hudson Company.

Messrs. *George F. Brownell* and *Adelbert Moot*, for the Erie Railroad Company.

MR. JUSTICE WHITE delivered the opinion of the court:*

We dismiss for the present a contention made by one of the corporations, that it is not a railroad company within the meaning of that term as used in the statute, which we shall have occasion to consider, because it is merely a coal company, whose transporting operations are but incidental to its mining opera-

*In announcing the decision on May 3, 1909, Mr. Justice White read a memorandum giving the gist of the opinion now published.

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tions. With this contention put aside, it is true to say, speaking in a general sense, that the corporations, parties to this record, by means of railroads owned and operated by them, were engaged in transporting coal from the anthracite coal fields in Pennsylvania to points of market for ultimate delivery in other states. With much of the coal so transported the corporations had been or were connected by some relation distinct from the association which was necessarily engendered by the transportation of the commodity by the corporations as common carriers in interstate commerce. While the business of the corporations, generally speaking, had these characteristics, there were differences between them. Some of the corporations owned and worked mines, and transported over their own rails in interstate commerce the coal so mined, either for their own account or for the account of those who had acquired title to the coal prior to the beginning of the transportation. Others, while operating railroads, not only owned but also leased and operated coal mines, and carried the coal produced from such mines in the same way. Again, others of the railroad companies, although not operating mines, were the owners of stock in corporations engaged in mining coal, the coal produced by such corporations being carried in interstate commerce by the railroad companies holding the stock in the producing coal companies, either for account of the producing corporations or for persons to whom the coal had been sold at the point of production prior to the beginning of interstate commerce. This, moreover, was, additionally, the case as to some of the railroad companies who, as we have previously stated, were engaged both in the production of coal from mines owned by them and in interstate transportation of such product. All the attributes thus enjoyed by the corporations had been possessed by them for a long time, and were expressly conferred by the laws of Pennsylvania, and, in some instances, also by the laws of other states, in which the companies likewise, in part, carried on their business. We insert in the margin a summary which the court below made concerning the situation of the respective corporations, taken from the answer or return made by each corporation.*

*It is admitted, generally, by the defendants, that the allegations in the bills and petitions, as to their corporate existence, are true, and that they own or operate railroads engaged in the interstate transportation of coal from the anthracite region of Pennsylvania. They also admit that this transportation has been carried on by the several defendants long prior to the 8th day of May, 1906, and, in the case of some of them, for a period varying from a quarter to more than half a century prior thereto. In addition to these general admissions, detailed statements are made by the defendants, respectively, of the character and extent of the ownership or other interests possessed by them in the coal so transported, or in the lands or mines from which it is produced. It is only necessary to briefly summarize these statements:

(1) The Delaware & Hudson Company alleges that it directly owns

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After the first day of May, 1908, the government of the United States commenced these proceedings by bill in equity against each of the corporations, to enjoin each from carrying in interstate commerce any coal produced under the circumstances which we have stated. At the same time a petition in mandamus was filed against each corporation, seeking to accomplish the same result. Both the equity causes and the mandamus proceedings were based upon the assumption that the 1st section of the act to regulate commerce, as amended and re-enacted by the law usually referred to as the Hepburn act, approved June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892), contained a provision, generally known as the commodities clause, which caused it to be illegal for the corporations after May 1, 1908, to transport in interstate commerce coal with which the railroad companies were or had been connected or associated in any of the modes above stated. Except as we have said, in the particular that one of the corporations claimed that it was not a railroad company within the meaning of the commodities clause, they all defended substantially upon the ground, that, when corrected interpreted, the commodities clause did not forbid the interstate commerce traffic in coal by them carried on. If it did, the clause was assailed as inherently repugnant to the Constitution, because the right to enact it was not embraced within the authority conferred upon Congress to regulate com-

its coal lands as it does its railroad; that it was incorporated by an act of the legislature of the state of New York, April 23, 1823 . . . and was "authorized to construct a canal or water navigation from the anthracite coal district in Pennsylvania to the Hudson river in New York; to purchase lands in Pennsylvania containing stone or anthracite coal; and to employ its capital in the business of transporting to market coal mined from such lands." That this authority was also expressly conferred by acts of the legislature of the state of Pennsylvania, between the years 1823 and 1871, and that these acts of the state of Pennsylvania resulted from the desire that policy of said state to create and foster the industry of mining such coal and developing the transportation thereof; that, under the authority of these statutes of Pennsylvania and of New York, the said defendant, beginning as early as the year 1825, invested its capital in the purchase of a large quantity of coal lands in the state of Pennsylvania and in the construction of canal navigation in Pennsylvania from the Delaware river to the Hudson river; that later, under statutes of both states, it invested additional capital in the construction of railroads in the state of Pennsylvania, and in the construction and acquisition of railroads and leasehold estates in the state of New York, for the same general purpose of transporting coal from the coal lands owned by it; that it has invested large sums of money, not only in the acquisition of coal property, but in the erection of structures for mining and terminal facilities; that some of its coal properties were acquired under leases upon royalties payable to the lessors for each ton of coal mined, the leases fixing large minimum amounts by way of rent; that large fixed rentals are required to be paid, not only for those mining lands, but for railroads acquired for the purpose of transporting coal; that there are three coal companies whose shares are practically all owned by it;

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merce. In addition it was contended that even if, abstractly, considered, the clause might be embraced within the grant of power to regulate commerce, nevertheless its provisions were in conflict with the due process clause of the 5th Amendment to the Constitution because of the destructive effect which the enforcement of its provisions would produce on the rights of property which the corporations possessed and had long enjoyed under the sanction of valid state laws. It was besides insisted that, in any event, the clause was repugnant to the Constitution because of the discrimination caused by the exception as to timber and the manufactured products thereof. The cases were submitted on the pleadings, and were heard and decided at one and the same time. Treating the clause as having the meaning which the government contended for, the court came to consider the alleged repugnancy of the enactment to the Constitution. In the principal opinion the subject was at least formally approached, but for the purpose of deciding whether inherently the commodities clause was within the competency of Congress to enact as a regulation of commerce, but whether the provisions of that clause were repugnant to the Constitution because of the destructive effect of its prohibitions upon the vast sum of property rights which the corporations were found to enjoy as a result of valid state laws. In this aspect the issue which the court

viz., the Northern Coal & Iron Company, the Jackson Coal Company, and the Hudson Coal Company; that its mining lands thus owned and acquired are located upon or contiguous to the railroads of defendant; that said railroads are the only reasonable, practical, and conveniently available avenues of transportation whereby the coal by it produced can be transported in interstate commerce, and the coal mined by the defendant and by said coal companies upon its lines of railroad amounts approximately to 70 per cent of the entire transportation by it, or to about 4,300,000 gross tons, its daily shipments averaging about 12 trains of 37 coal cars each; that the coal lands so acquired by the defendant and by said three coal companies would have little, if any, value, except for the mining of coal therefrom and its sale as a commercial commodity, and that if it is deprived, by virtue of the said act of Congress, of the right to transport said coal, it will be deprived of the only possible enjoyment of its property. It further avers that it is not a "railroad company" within the meaning of the act of Congress, but that it is a coal company; and that since the year 1870 it has become, incidentally to its business as a coal mining company, a common carrier by railroad of passengers and property.

It is further averred, as a special ground of defense by the said Delaware & Hudson Company, that this said "commodities clause," does not apply to it, because all the coal mined by it upon its own lands, and upon the lands of the said three coal companies (except as to steam sizes, as thereafter stated), "is sold, before transportation thereof begins, by said company to third persons at the mines in Pennsylvania from which such coal has been produced, and that said company does not, at the time when the same is so transported by it in interstate commerce, own the same nor any interest therein,

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deemed it was called upon to determine was thus by it epitomized:

"The fundamental and underlying question, however, which presents itself at the threshold of all the cases for our consideration, is whether the so-called 'commodities clause' amendatory of the act to regulate commerce, passed June 29, 1906, so far as its scope applies by the universality of its language to the cases here presented, is in excess of the legislative authority granted to Congress by the Constitution. This question must be considered with reference to the Constitution as a whole, and in relation to the concrete facts of the several cases. It is therefore necessary to keep in mind the situation as presented by these defendants, the facts set forth in their individual answers as above briefly summarized, and the relevant industrial conditions, which being matters of common knowledge, may be judicially noticed."

The situation which it was considered should be kept in mind for the purpose of passing upon the constitutional question was thus stated:

"The general situation is that for half a century or more it has been the policy of the state of Pennsylvania, as evidenced by her legislative acts, to promote the development of her natural resources, especially as regards coal, by encouraging railroad companies and canal companies to invest their funds in coal lands, so that the product of her mines might be conveniently and

direct or indirect, apart from its obligation and rights as a common carrier in the transportation thereof, and that it carries said coal for the account of the purchaser there, who is the consignor and owner of said coal."

(2) The answer of the Erie Railroad Company states that it was originally organized under the laws of the state of New York in 1832 * * * that it has been reorganized from time to time under mortgage foreclosure; and finally, in November, 1895, under a foreclosure sale, it was reorganized under the statutes of New York, whereby it "became the lawful owner of the property, rights, privileges, immunities, and franchises of all its predecessors aforesaid, including the shares of capital stock of coal companies and of railroad companies, as well as the railroads theretofore held and possessed by said predecessor companies, the railroads so owned by it and its said subsidiary companies having an aggregate mileage of over 2,100 miles in the states of New York, Pennsylvania, New Jersey, Ohio, Indiana, and Illinois;" that the Pennsylvania Coal Company was created a corporation by the laws of Pennsylvania in 1838 * * * its charter giving it the right of "transacting the usual business of companies engaged in mining, transporting to market, and selling coal and the other products of coal mined;" and for that purpose it was given the power to purchase or lease coal lands in Pennsylvania; also the power to construct railroads with one or more tracks. In 1853 * * * the said Pennsylvania Coal Company was authorized to extend its railroad to connect with the New York & Erie Railroad. The right of said Pennsylvania Coal Company to buy coal lands and build railroad connections was continued by acts of the legislature of Pennsylvania in 1857 * * * 1864 * * * 1867

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profitably conveyed to market in Pennsylvania and other states. Two of the defendant corporations, as appears from their answers, were created by the legislature of Pennsylvania, one of them three quarters of a century ago and the other half a century ago, for the expressed purpose that its coal lands might be developed and that coal might be transported to the people of Pennsylvania and of other states. It is not questioned that, pursuant to this general policy, investments were made by all the defendant companies in coal lands and mines and in the stock of coal-producing companies, and that production was enormously increased and its economies promoted by the facilities of transportation thus brought about. As appears from the answers filed, the entire distribution of anthracite coal in and into the different states of the Union and Canada for the year 1905 (the last year for which there are authoritative statistics) was 61,410,201 tons; that approximately four fifths of this entire production of anthracite coal was transported in interstate commerce over the defendant railroads, from Pennsylvania to markets and other states and Canada, and of this four fifths, from 70 to 75 per cent was produced either directly by the defendant companies or through the agency of their subsidiary coal companies.

"It also appears from the answers filed that enormous sums of money have been expended by these defendants to enable them to mine and prepare their coal and to transport it to any point where there may be a market for it. It is not denied that the situation thus generally described is not a new one, created since

* * * and 1868 * * * ; that in pursuance of these various acts of the legislature, the Pennsylvania Coal Company obtained capital, issued stock therefor, acquired coal lands, developed coal mines, produced, transported to markets, and sold coal; built and operated railroads, made railway connections as authorized, and did other like acts to promote the business of supplying all persons needing the same with anthracite coal. The Hillside Coal & Iron Company was organized by an act of the legislature of the state of Pennsylvania in 1869 * * * for the purposes and with powers similar to those of the Pennsylvania Coal Company. Under authority of acts of the legislature of Pennsylvania the said Erie Railroad Company, long prior to the passage of the said amendment to the interstate commerce act, acquired substantially all the capital stock of said Pennsylvania Coal Company, the Hillside Coal & Iron Company, the Jefferson Railroad Company, and Erie & Wyoming Railroad Company, and a small minority of the stock of the Temple Iron Company; and has pledged the same under various mortgages, pursuant to which have been issued and are now outstanding bonds for large sums, aggregating many millions of dollars, which bonds are held by purchasers in good faith and for value throughout the world; that, for many years prior to May 1, 1908, it has been engaged in transporting the coal of said corporations to markets outside the state of Pennsylvania, many of which can only be reached from the railroad lines of this defendant; that the coal so transported amounts annually to several millions of tons and constitutes 22 per cent of the entire freight tonnage of this defendant, the Erie Company. It also denies that it is, by reason of the ownership of said stock in said companies,

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the passage of the act in question, but has existed for a long period of years prior thereto, and that the rights and property interests acquired by the said defendants in the premises have acquired in conformity to the Constitution and laws of the state of Pennsylvania, and that their right to the enjoyment of the same has never been doubted or questioned by the courts or people of that commonwealth, but has been fully recognized and protected by both."

It was decided that, as applied to the defendants, the commodities clause was not within the power of Congress to enact as a regulation of commerce. 164 Fed. 215. A member of the court dissented and expressed his reasons in a written opinion. Without adverting to all the reasoning expounded in that opinion, we think it accurate to say that, in a large and ultimate sense, it proceeded upon the assumption that, as the commodities clause provided, to quote the summing up of the opinion, for "the divorce of the dual relation of public carrier and private transporter," it was a regulation of commerce, and as such was within the power of Congress to enact, and when enacted was operative upon the defendants, and therefore required them to conform to the regulation, even although to do so might in some way indirectly affect valid rights derived from prior state legislation.

Judgments and decrees were entered denying the applications for mandamus and dismissing the bills of complaint.

the owner in whole or in part of the coal transported by it in interstate commerce, or that it has or had any interest, direct or indirect, therein, and therefore has not violated or failed to comply with the so-called "commodities clause" of the interstate commerce act.

(3) The Central Railroad Company of New Jersey avers that it was organized under the laws of the state of New Jersey, and by these laws was authorized to purchase and hold the stock or securities of any other corporation, of New Jersey or elsewhere, and that it was also so authorized by two acts of assembly of the state of Pennsylvania, one of which, approved April 15th, 1869 * * * was entitled "An Act to Authorize Railroad and Canal Companies to Aid in the Development of Coal, Iron, Lumber, and Other Material Interests of This Commonwealth;" that, pursuant to the authority of these several acts, it had, long prior to the said act of Congress, become the owner of a majority of the shares of the capital stock of the Honeybrook Coal Company and of the Wilkesbarre Coal & Iron Company, both companies now being merged into the Lehigh & Wilkesbarre Coal Company, a large majority of whose shares are owned by it; that it also owns a minority of the shares of the Temple Iron Company; that in 1871 it became the lessee of the Lehigh & Susquehanna Railroad, a Pennsylvania corporation, which it has ever since operated under an obligation to pay a yearly rental of not less than \$1,414,400, and not to exceed \$2,043,300 per annum; that its gross earnings from the transportation of coal amounted, for the year ending June 7th, 1907, to \$9,312,268.04, being 48 per cent of its entire freight receipts; and that a large part of its earnings from freight and miscellaneous passenger traffic is incident to and dependent upon the operation of the mines and collieries of said coal companies;

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The text of the commodities clause upon which the cases depend is as follows:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any state, territory, or the District of Columbia to any other state, territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The government insists that this provision prohibits railroad companies from transporting in interstate commerce articles or commodities other than the excepted class, which have been manufactured, mined, or produced by them or under their authority, or which they own or may have owned, in whole or in part, or in which they have or may have had any interest, direct or indirect. These prohibitions, it is further insisted, apply to the transportation by a railroad company in interstate commerce of a commodity which has been manufactured, mined, or produced by a corporation in which the transporting railroad company is a stockholder, irrespective of the extent of such stock ownership. This construction of the provision rests not only upon the meaning which the government insists should be given to its text, but on the significance of the text as illumined by what it is in-

and that the greater part of its earnings from transportation of coal comes from its carriage of the coal mined by the Lehigh & Wilkesbarre Coal Company; and that large sums of money have been expended by it in extending its lines and in constructions to enable it to transport said coal in interstate commerce.

(4) The Delaware, Lackawanna, & Western Railroad Company, like the Delaware & Hudson Company, admits that it is the owner of coal lands and mines coal which it sells; that it was organized under an act of the legislature of Pennsylvania in 1849 * * * that all the lines of railroad owned by it are wholly within the state of Pennsylvania, extending from the Delaware river, at the boundary line of the state of New Jersey, in a northwesterly direction across the state of Pennsylvania to the boundary line between the state of Pennsylvania and the state of New York, with a branch line extending from Scranton, in the state of Pennsylvania, to Northumberland, in said state. Said defendant also admits and alleges that, under express authority of acts of the legislature of the states of Pennsylvania, New Jersey, and New York, it, as lessee, now operates, and, long prior to May 1st 1908, has operated, various lines of railroad in the two last-mentioned states, by which it has direct traffic connection with the city of Buffalo and other cities in the said states. Defendant also admits that for many years it has owned in fee extensive tracts of coal land in the state of Pennsylvania; that it has also leased large tracts of coal land in the said state, and is now engaged, and for many years last past has been engaged, in mining coal from the land so owned and leased by it; that the holding of said lands, whether in fee or by lease, and the mining, manufacture, and inter-

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sisted was the result intended to be accomplished by the enactment of the clause. The purpose, it is contended, was not merely to compel railroad companies to dissociate themselves before transportation from articles or commodities manufactured, mined, produced, or owned by them, etc., but moreover to divorce the business of transporting commodities in interstate commerce from their manufacture, mining, production, ownership, etc., and thus to avoid the tendency to discrimination, forbidden by the act to regulate commerce, which, it is insisted, necessarily inheres in the carrying on by a railroad company of the business of manufacturing, mining, producing, or owning, in whole or in part, etc., commodities which are by it transported in interstate commerce.

The construction relied on is thus summed up in the argument of the government: "It (the clause) forbids the carrier who owns the mines and sells coal, to transport that coal in interstate commerce. . . . This is not trifling with the question. It states the exact fact and the reality." And, in accordance with this principle, the insistence in argument is that it was the duty of the carriers who owned and worked coal mines, or who had stock in such mines, or who owned coal, in order to bring themselves within the law, to dispose absolutely of all their interest in coal-producing property, in whatever form enjoyed, and to cease absolutely from acquiring like rights in the future. It was, doubtless, because of the far-reaching effect of this construction upon the enormous property interests involved which caused the result of the provision to be thus stated in the argument for the gov-

state transportation of the coal therefrom, has been, and continues to be, under and by virtue of the authority of the laws of the state of Pennsylvania.

That, in addition to the foregoing, certain coal companies, organized from time to time under acts of assembly of the said state of Pennsylvania, have been merged into said defendant corporation; that, by an act of the general assembly of the state of Pennsylvania, approved April 15th, 1869, entitled, "An Act to Authorize Railroad and Canal Companies to Aid in the Development of the Coal, Iron, Lumber, and Other Material Interests of This Commonwealth," the defendant was authorized to aid corporations authorized by law to develop coal, iron, lumber, and other material interests of Pennsylvania, by the purchase of their capital stock or bonds, or either of them. The answer of said defendant also alleges that, by reason of its ownership of said coal lands and coal, and the revenues derived from the transportation of the same to market, it has been enabled to expend millions in the betterment of its general transportation facilities for both goods and passengers, and give to the public the benefits of a well constructed and equipped modern railroad.

That, by virtue of leases of railroads, to enable it to transport coal in interstate commerce, it has become bound to pay yearly, in interest charges, the sum of \$5,155,697, and for taxes, \$1,163,916. That out of a total of about 8,700,000 tons of coal produced by it in the year 1907 from its lands owned in fee and leased, upwards of 6,700,000 tons were transported over its lines of railroad in interstate commerce; that from 40 per cent to 60 per cent of its annual transpor-

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ernment: "This is undoubtedly a searching and radical law, and was meant to be so." True, the government, in argument, suggests that the radical result of the statute may be assuaged, without violating its spirit, by limiting its prohibitions so as to cause them to apply only so long as the commodities to which it applies are in the hands of a carrier or its first vendee. But no such limitation is expressed in the statute, and to engraft it would be an act of pure judicial legislation. Besides, to do so would be repugnant to the asserted spirit and purpose of the statute which lies at the foundation of the construction upon which the government relies.

Let us, as a prelude to an analysis of the clause, for the purpose of fixing its true construction, and determining the constitutional power to enact it when its significance shall have been rightly defined, point out the questions of constitutional power which will require to be decided if the construction relied upon by the government is a correct one.

We at once summarily dismiss all the elaborate suggestions made in argument as to the alleged wrong to result from the enforcement of the clause, if it be susceptible of the construction which the government has placed upon it. We do this because, obviously, mere suggestions of inconvenience or harm are wholly irrelevant, as they cannot be allowed to influence us in determining the question of the constitutional power of Congress to enact the clause.

Let it be conceded at once that the power to regulate commerce

tation earnings, from the operation of leased lines, has been derived from the carriage of its own coal thereover.

That it uses, in the conduct of its business as a common carrier, approximately 1,700,000 tons of anthracite coal, of pea size or smaller, annually, and will require more for such use in the future; that to obtain this coal in these economic sizes it is necessary to break up coal, leaving the larger sizes, which must be disposed of otherwise; that great waste would result if it were forbidden to transport to market in interstate commerce these larger sizes thus resulting.

That defendant's rights to acquire its holding of coal land, its rights to own and mine coal and to transport the same to market in other states as well as in Pennsylvania, and its leases of other railroads, were acquired many years prior to the enactment of the so-called "interstate commerce act," and of the said amendment thereto known as the "commodities clause."

(5) The answer of the Pennsylvania Railroad Company avers that it was incorporated under the laws of the state of Pennsylvania April 13th, 1846 * * * that, as early as 1871, under authority of two general statutes of the state of Pennsylvania, it became the owner of all the shares of the Susquehanna Coal Company, of all the shares of the Summit Branch Mining Company, and of one third of the shares of the Mineral Railroad Mining Company, corporations of the state of Pennsylvania; that since the last-mentioned year, and up to the present time, it has carried the coal produced from the mines of the said coal companies, at lawfully established schedule rates, over its lines of railroad; that approximately 65 per cent of the coal so mined has been carried to destinations outside the state of

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possessed by Congress is, in the nature of things, ever-enduring, and therefore the right to exert it to-day, tomorrow, and at all times in its plenitude must remain free from restrictions and limitations arising or asserted to arise by state laws, whether enacted before or after Congress has chosen to exert and apply its lawful power to regulate. For our present purposes, moreover, although we may have occasion to examine the subject hereafter, we entirely put out of view all the contentions based upon the assumption that even, although the provisions of the clause be, in and of themselves, lawful regulations of commerce, if prospectively applied, nevertheless they cannot be so considered, because of their retroactive effect upon the rights of the defendants, alleged to have been secured by valid state laws. We further concede, for the purpose of the inquiry we are at present making, although we may also have occasion to examine the subject hereafter, that the power of Congress to regulate commerce can be constitutionally so exerted as to compel a railroad company engaged in interstate commerce to dissociate itself in interest from the commodities which it transports in interstate commerce, even although, by existing state laws, the railroad company may have a lawful right of ownership or association with the commodity upon which the regulation operates.

With these concessions in mind, and despite their far-reaching effect, if the contentions of the government as to the meaning of the commodity clause be well founded, at least a majority of the court are of the opinion that we may not avoid determining

Pennsylvania; that it mines no coal, but that the coal it carries is mined by the said coal companies, and that it has no interest therein within the meaning of the said act of Congress, either direct or indirect; that the most largely producing of the properties belonging to these coal companies are located either directly upon or so contiguous to the system of railroads operated by said defendant as to render transportation by any other railroads not reasonably practicable.

(6) The answer of the Lehigh Valley Railroad Company states that it was originally incorporated September 20th, 1847, under the laws of the state of Pennsylvania. Under the authority of various acts of assembly of the said state, other railroad and coal companies, prior to the year 1874, have been merged into it, some of which railroads were expressly authorized to construct railroads and to carry on the business of mining, transporting, and vending coal. It is also the lessee of railroads in Pennsylvania; that, by means of its own and of said leased lines of railroad, it conducts, and for many years had conducted, an interstate transportation of coal; that since 1872, pursuant to authority conferred by the laws of Pennsylvania, it has also owned the majority of the capital stock of the New York & Middle Coal Field Railroad & Coal Company, a corporation of the state of Pennsylvania; also the entire capital stock of Coxe Bros. & Company a corporation of said state; a minority interest in the capital stock of the Highland Coal Company; a majority of the stock of the Locust Mountain Coal & Iron Company; a minority interest of the capital stock of the Packer Coal Company and of the Temple Iron Company, all corporations of the state of Pennsylvania, organized for the purpose of mining coal, some of them more than a half century ago; that it has

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the following grave constitutional questions: 1. Whether the power of Congress to regulate commerce embraces the authority to control or prohibit the mining, manufacturing, production, or ownership of an article or commodity, not because of some inherent quality of the commodity, but simply because it may become the subject of interstate commerce. 2. If the right to regulate commerce does not thus extend, can it be impliedly made to embrace subjects which it does not control, by forbidding a railroad company engaged in interstate commerce from carrying lawful articles or commodities because, at some time prior to the transportation, it had manufactured, mined, produced, or owned them, etc.? And involved in the determination of the foregoing questions we shall necessarily be called upon to decide: (a) Did the adoption of the Constitution and the grant of power to Congress to regulate commerce have the effect of depriving the states of the authority to endow a carrier with the attribute of producing as well as transporting particular commodities,—a power which the states from the beginning have freely exercised, and by the exertion of which governmental power the resources of the several states have been developed, their enterprises fostered, and vast investments of capital have been made possible? (b) Although the government of the United States, both within its spheres of national and local legislative power, has in the past, for public purposes, either expressly or impliedly, authorized the manufacture, mining, production, and carriage of commodities by one and the same railway corporation, was the exertion of such

constructed lines of railroad and branch railroads and terminal facilities for the purpose of transporting to market, in interstate commerce, the coal of the company whose shares it owns, and this business has been conducted by it for many years; that practically said coal can be transported to market only by its railroads; that the capital stock of two of the coal companies owned by said defendant has been transferred to a trustee, to hold under a general mortgage executed by defendant, under which mortgage bonds to the amount of \$23,539,000 have been issued by said defendant and are now outstanding in the hands of the public; that the capital stock of Coxe Bros. & Company, Incorporated, owned by this defendant as aforesaid, has been transferred and assigned to, and is now held by a trustee under a collateral trust agreement executed by said defendant, dated November 1, 1905, for the purpose and upon the terms expressed in said agreement, a copy of which is annexed to said answer, and that bonds to the amount of \$18,000,000 have been issued under said agreement and are now outstanding in the hands of the public; that said defendant transports annually, in interstate commerce, upwards of 7,600,000 tons of anthracite coal, shipped by the said coal companies whose stock is owned by said defendant, in whole or in part as aforesaid, and transports annually for said coal companies, wholly within the state of Pennsylvania, upwards of 1,500,000 tons; that nearly 42 per cent of its gross annual earnings of \$36,068,431 for the last fiscal year, or \$15,110,899, were derived from coal freights, which represented over 51 per cent of its entire freight tonnage; that the greater part of its gross earnings from coal transportation was received from the coal companies whose shares are by it owned; that the mines and collieries of said coal

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power beyond the scope of the authority of Congress, or, what is equivalent thereto, was its exercise but a mere license, subject at any time to be revoked and completely destroyed by means of a regulation of commerce?

While the grave questions thus stated must necessarily, as we have said, arise for decision if the contention of the government, as to the meaning of the commodity clause be correct, we do not intend, by stating them, to decide them, or even in the slightest degree to presently intimate, in any respect whatever, an opinion upon them. It will be time enough to approach their consideration if we are compelled to do so hereafter, as the result of the further analysis which we propose to make in order to ascertain the meaning of the commodities clause.

It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars' & M. Life Indemnity Co. v. Jarman*, 187 U. S. 197, 205, 47 L. ed. 139, 145, 23 Sup. Ct. Rep. 108. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional, and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, ante, 115, 29 Sup. Ct. Rep. 115.

Recurring to the text of the commodities clause, it is apparent that it disjunctively applies four generic prohibitions; that is, it forbids a railroad carrier from transporting in interstate commerce articles or commodities, 1, which it has manufactured, mined, or produced; 2, which have been so mined, manufactured, or produced under its authority; 3, which it owns in whole or in part; and, 4, in which it has an interest, direct or indirect.

companies are all so located in the portions of the coal fields tributary to its lines of railroad that no means of transporting their product can be made available, except by defendant's railroads; that the railroad lines of this defendant have been from time to time extended, the control of other railroads acquired, and its facilities and equipment increased at enormous expense, in reliance upon the rights and franchises conferred by the statutes of Pennsylvania aforesaid; that a very large part of defendant's earnings is derived from the freight and passenger traffic incidental to and dependent upon the operation of the mines and collieries of said coal companies, and that, if said defendant were deprived of the earnings derived from the transportation of the coal of said coal companies, its business could not be continued, except at a net loss of many millions of dollars per annum.

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It is clear that the two prohibitions which relate to manufacturing, mining, etc., and the ownership resulting therefrom, are, it literally construed, not confined to the time when a carrier transports the commodities with which the prohibitions are concerned, and hence the prohibitions attach and operate upon the right to transport the commodity because of the antecedent acts of manufacture, mining, or production. Certain also is it that the two prohibitions concerning ownership, in whole or in part, and interest, direct or indirect, speak in the present, and not in the past; that is, they refer to the time of the transportation of the commodities. These last prohibitions, therefore, differing from the first two, do not control the commodities if, at the time of the transportation, they are not owned in whole or in part by the transporting carrier, or if it then has no interest, direct or indirect, in them. From this it follows that the construction which the government places upon the clause as a whole is in direct conflict with the literal meaning of the prohibitions as to ownership and interest, direct or indirect. If the first two classes of prohibitions as to manufacturing, mining, or production be given their literal meaning, and therefore be held to prohibit, irrespective of the relation of the carrier to the commodity at the time of transportation, and a literal interpretation be applied to the remaining prohibitions as to ownership and interest, thus causing them only to apply if such ownership and interest exist at the time of transportation, the result would be to give to the statute a self-annihilative meaning. This is the case, since, in practical execution, it would come to pass that where a carrier had manufactured, mined, and produced commodities, and had sold them in good faith, it could not transport them; but, on the other hand, if the carrier had owned commodities and sold them it could carry them without violating the law. The consequence, therefore, would be that the statute, because of an immaterial distinction between the sources from which ownership arose, would prohibit transportation in one case and would permit it in another like case. An illustration will make this deduction quite clear: A carrier mines and produces and owns coal as a result thereof. It sells the coal to A. The carrier is impotent to move it for account of A in interstate commerce because of the prohibition of the statute. The same carrier at the same time becomes a dealer in coal, and buys and sells the coal thus bought to the same person, A. This coal the carrier would be competent to carry in interstate commerce. And this illustration not only serves to show the incongruity and conflict which would result from the statute if the rule of literal interpretation be applied to all its provisions, but also serves to point out that, as thus construed, it would lead to the conclusion that it was the intention, in the enactment of the statute, to prohibit manufacturing and production by a carrier, and, at the same time, to offer an

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incentive to a carrier to become the buyer and seller of commodities which it transported.

But it is said, on behalf of the government, in view of the purpose of Congress to prohibit railroad companies engaged in interstate commerce from being, at the same time, manufacturers, producers, owners, etc., of commodities which they carry, despite the literal sense of some of the prohibitions, they should all be construed so as to accomplish the result intended; and therefore their apparent divergence and conflict should be removed by construing them all as prohibiting the transportation because of the causes stated, irrespective of the particular relation of the railroad company to the commodities at the time of transportation. This suggestion, however, simply invites us, under the assumption that Congress had a particular intention in enacting the clause, to so construe the clause as to cause it to be essential to decide the grave constitutional questions which we have hitherto pointed out. On the contrary, as the prohibitions concerning ownership in whole or in part, and interest, direct or indirect, are susceptible only of the construction that the dissociation of the carrier with the products which it transports was contemplated, our duty is, if possible, to treat the other and apparently conflicting prohibitions as embracing a like purpose, and thus harmonize the provisions of the clause and prevent the necessity of approaching and passing upon the grave constitutional questions which would necessarily arise from pursuing the contrary course. This, it is urged, cannot be done, since to do so would be in effect to expunge the prohibitions against manufacturing, mining, and production from the clause, as ownership in whole or in part or interest, direct or indirect, would embrace everything which could possibly have been intended to be expressed by the terms manufacturing, mining, and production, if the proposed reconciliation of the conflict between the prohibitions be brought about. We think, however, that a brief reference to a ruling of this court concerning the effect of the interstate commerce law prior to its amendment by the Hepburn act, will serve to make clear the unsoundness of the proposition. The case referred to is that of *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272. In that case, after much consideration, it was held that the prohibitions of the interstate commerce act as to uniformity of rates and against rebates operated to prevent a carrier engaged in interstate commerce from buying and selling a commodity which it carried in such a way as to frustrate the provisions of the act, even if the effect of applying the act would be substantially to render buying and selling by an interstate carrier of a commodity which it transported practically impossible. In thus deciding, however, it became necessary (pp. 399, 400) to refer to rulings of the Interstate Commerce Com-

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mission construing the act to regulate commerce, made not long after the enactment of the statute, in which it was held that where interstate commerce carriers were engaged in manufacturing, mining, producing, and carrying commodities in virtue of state charters authorizing them so to do, granted prior to the enactment of the act to regulate commerce, that act could not be applied without confiscation, except in so far as the requirement of reasonableness of rates was concerned. While referring to those administrative rulings, and declaring that, in view of their long standing, the construction which had been thus given to the act should not be departed from, "at least, until Congress has legislated on the subject" (p. 401), it was nevertheless plainly intimated that legislation which compelled a carrier, even although authorized by its charter before the passage of the act to regulate commerce to engage in the production as well as transportation of commodities, to dissociate itself before transportation from the products which it manufactured, mined, or produced, would not, when enforced by proper rules and regulations, amount to confiscation. When, therefore, the subject of ownership, in whole or in part, or the interest of a carrier, direct or indirect, in the product which it transported, came to be considered, and the duty to dissociate before transportation came to be legislatively imposed, it is quite natural, in view of the prior administrative rulings and the intimations of this court, conveyed in the opinion in the New York, N. H. & H. R. Co. Case, to assume that the provisions as to manufacturing, mining, and production, while they may be somewhat redundant, were nevertheless expressed for the purpose of leaving no possible room for the implication that it was not the intention to include ownership resulting from manufacture, mining, production, etc., even although the right to manufacture, mine, and produce was sanctioned by state charters prior to the enactment of the act to regulate commerce. Looking at the statute from another point of view the same result is compelled. Certain it is that we could not construe the statute literally without bringing about the irreconcilable conflict between its provisions which we had previously pointed out, and therefore some rule of construction is essential to be adopted in order that the statute may have a harmonious operation. Under these circumstances, in view of the far-reaching effect to arise from giving to the first two prohibitions a meaning wholly antagonistic to the remaining ones, we think our duty requires that we should treat the prohibitions as having a common purpose; that is, the dissociation of railroad companies, prior to transportation, from articles or commodities, whether the association resulted from manufacture, mining, production, or ownership, or interest, direct or indirect. In other words, in view of the ambiguity and confusion in the statute, we think the duty of interpreting should not be so exerted as to

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cause one portion of the statute which, as conceded by the government, is radical and far-reaching in its operation if literally construed, to extend and enlarge another portion of the statute which seems reasonable and free from doubt if also literally interpreted. Rather it seems to us our duty is to restrain the wider, and, as we think, doubtful prohibitions, so as to make them accord with the narrow and more reasonable provisions, and thus harmonize the statute.

Nor is there force in the contention that because the going into effect of the clause was postponed for a period of nearly two years, therefore the far-reaching and radical effects which the government attributes to the clause must have been contemplated by Congress. We think, on the contrary, it is reasonable to infer, in view of the facts disclosed in the statement which we have previously excerpted, that the delay accorded is entirely consistent with the assumption that it was so granted to afford the time essential to make the changes which would be required to conform to the commands of the clause as we have interpreted it, such as providing the facilities for dissociation by sale at the point of production before transportation or segregation by means of the organization of bona fide manufacturing, mining, or producing corporations.

It remains to determine the nature and character of the interest embraced in the words "in which it is interested, directly or indirectly." The contention of the government that the clause forbids a railroad company to transport any commodity manufactured, mined, or produced, or owned in whole or in part, etc., by a bona fide corporation in which the transporting carrier holds a stock interest, however small, is based upon the assumption that such prohibition is embraced in the words we are considering. The opposing contention, however, is that interest, direct or indirect, includes only commodities in which a carrier has a legal interest, and therefore does not exclude the right to carry commodities which have been manufactured, mined, produced or owned by a separate and distinct corporation, simply because the transporting carrier may be interested in the producing, etc., corporation as an owner of stock therein. If the words in question are to be taken as embracing only a legal or equitable interest in the commodities to which they refer, they cannot be held to include commodities manufactured, mined, produced, or owned, etc., by a distinct corporation merely because of a stock ownership of the carrier. *Pullman's Palace Car Co. v. Missouri P. R. Co.*, 115 U. S. 588, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728. And that this is well settled also in the law of Pennsylvania is not questioned. It is unnecessary to pursue the subject in more detail, since it is conceded in the argument for the government that, if the clause embraces only a

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legal interest in an article or commodity, it cannot be held to include a prohibition against carrying a commodity simply because it had been manufactured, mined, or produced, or is owned by a corporation in which the carrier is a stockholder. The contention of the government substantially rests upon the assumption that, unless the words be given the meaning contended for, they are without significance. That this is clearly not the case is well illustrated by the New York, N. H. & H. R. Co. Case, *supra*. In that case the Chesapeake & Ohio Railway Company it was shown at one time not only directly engaged in buying, selling, and transporting coal, but subsequently, when a statute was passed in West Virginia prohibiting such dealings, it resorted to indirect methods for the continuance of its previous practice. It may well be that the very object of the provision was to reach and render impossible the successful employment of methods of the character referred to. Certain it is, however, that, in the legislative progress of the clause in the Senate, where the clause originated, an amendment in specific terms, causing the clause to embrace stock ownership, was rejected, and immediately upon such rejection an amendment, expressly declaring that interest, direct or indirect, was intended, among other things, to embrace the prohibition of carrying a commodity manufactured, mined, produced, or owned by a corporation in which a railroad company was interested as a stockholder, was also rejected. 40 Cong. Rec. pt. 7, pp. 7012-7014. And the considerations just stated, we think, completely dispose of the contention that stock ownership must have been in the mind of Congress, and therefore must be treated as though embraced within the evil intended to be remedied, since it cannot in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense, upon the theory that a provision which was expressly excluded was intended to be included. If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it. At all events, in view of the far-reaching consequences of giving the statute such a construction as that contended for, as indicated by the statement taken from the answers and returns which we have previously inserted in the margin, and of the questions of constitutional power which would arise if that construction was adopted, we hold the contention of the government not well founded.

We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (a) When the article or commodity has been manufactured, mined, or produced by a carrier or under its au-

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thority, and, at the time of transportation, the carrier has not, in good faith, before the act of transportation, dissociated itself from such article or commodity; (b) When the carrier owns the article or commodity to be transported, in whole or in part; (c) When the carrier, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore articles or commodities manufactured, mined, produced, or owned, etc., by a bona fide corporation in which the railroad company is a stockholder.

The question then arises whether, as thus construed, the statute was inherently within the power of Congress to enact as a regulation of commerce. That it was, we think is apparent; and if reference to authority to so demonstrate is necessary, it is afforded by a consideration of the ruling in the New York, N. H. & H. R. Co. Case, to which we have previously referred. We do not say this upon the assumption that, by the grant of power to regulate commerce, the authority of the government of the United States has been unduly limited, on the one hand, and inordinately extended, on the other, nor do we rest it upon the hypothesis that the power conferred embraces the right to absolutely prohibit the movement between the states of lawful commodities, or to destroy the governmental power of the states as to subjects within their jurisdiction, however remotely and indirectly the exercise of such powers may touch interstate commerce. On the contrary, putting these considerations entirely out of mind, the conclusion just previously stated rests upon what we deem to be the obvious result of the statute as we have interpreted it; that it merely and unequivocally is confined to a regulation which Congress had the power to adopt and to which all pre-existing rights of the railroad companies were subordinated. *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.

We think it unnecessary to consider at length the contentions based upon the due process clause of the 5th Amendment. In form of statement those contentions apparently rest upon the ruinous consequences which it is assumed would be operated upon the property rights of the carriers by the enforcement of the clause, interpreted as the government construed it. For the purpose of our consideration of the subject it may be conceded, as insisted on behalf of the United States, that these contentions proceed upon the mistaken and baleful conception that inconvenience, not power, is the criterion by which to test the constitutionality of legislation. When, however, mere forms of statement are put aside and the real scope of the argument at bar is grasped, we think it becomes clear that, in substance and effect, the argument really asserts that the clause, as construed by the government, is not a regulation of commerce, since it transcends the limits of regulation and embraces absolute prohibitions, which,

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it is insisted, could not be exerted in virtue of the authority to regulate. The whole support upon which the propositions and the arguments rest hence disappears as a result of the construction which we have given the statute. Through abundance of caution we repeat that our ruling here made is confined to the question before us. Because, therefore, in pointing out and applying to the statute the true rule of construction, we have indicated the grave constitutional questions which would be presented if we departed from that rule, we must not be considered as having decided those questions. We have not entered into their consideration, as it was unnecessary for us to do so.

Without elaborating, we hold the contention that the clause under consideration is void because of the exception as to timber, and the manufactured products thereof, is without merit. Deciding, as we do, that the clause, as construed, was a lawful exercise by Congress of the power to regulate commerce, we know of no constitutional limitation requiring that such a regulation, when adopted, should be applied to all commodities alike. It follows that even if we gave heed to the many reasons of expedience which have been suggested in argument against the exception, and the injustice and favoritism which it is asserted will be operated thereby, that fact can have no weight in passing upon the question of power. And the same reasons also dispose of the contention that the clause is void as a discrimination between carriers.

With reference to the contention that the commodities clause is void because of the nature and character of the penalties which it imposes for violations of its provisions, within the ruling in *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, we think it also suffices to say that even if the delay which the clause provided should elapse between its enactment and the going into effect of the same does not absolutely exclude the clause from the ruling in *Ex parte Young*,—a question which we do not feel called upon to decide,—nevertheless the proposition is without merit, because (a) no penalties are sought to be recovered in these cases, and (b) the question of the constitutionality of the clause relating to penalties is wholly separable from the remainder of the clause, and, therefore, may be left to be determined should an effort to enforce such penalties be made.

There is a contention as to one of the defendants, the Delaware & Hudson Company, to which we, at the outset, referred, which requires to be particularly noticed. Under the charters granted to the company by the states of New York and Pennsylvania, it was authorized to secure coal lands and mine coal, and, without going into detail, was originally authorized to construct a canal, and, ultimately, a railroad for the purpose of transporting, for its own account, the products of its mines; and, undoubt-

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edly, vast sums of money have been invested in carrying out these purposes. It is true also that the company is the owner of stock in various coal corporations. The claim now to be disposed of is that, by the true construction of its charters, the Delaware & Hudson Company is not a railroad company within the meaning of the term as used in the commodities clause, but is really a coal company. The contention, we think, is without merit. The facts stated in the excerpts from the answer and returns of the company, which we have previously placed in the margin, leave no doubt that the corporation was engaged as a common carrier by rail in the transportation of coal in the channels of interstate commerce, and as such we think it was a railroad company within the purview of the clause, and subject to the regulations which are embodied therein, as we have interpreted them.

As the court below held the statute wholly void for repugnancy to the Constitution, it follows from the views which we have expressed that the judgments and the decrees entered below must be reversed. As, however, it was conceded in the discussion at bar that, in view of the public and private interests which were concerned, the United States did not seek to enforce the penalties of the statute, but commenced these proceedings with the object and purpose of settling the differences between it and the defendants, concerning the meaning of the commodities clause and the power of Congress to enact it, as correctly interpreted, and upon this view the proceedings were heard below by submission upon the pleadings, we are of opinion that the ends of justice will be subserved not by reversing and remanding with particular directions as to each of the defendants, but by reversing and remanding with directions for such further proceedings as may be necessary to apply and enforce the statute as we have interpreted it.

And it is so ordered.

MR. JUSTICE HARLAN, dissenting:

As these cases have been determined wholly on the construction of those parts of the Hepburn act [34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892] which are here in question, and as Congress if it sees fit, may meet that construction by additional legislation, I deem it unnecessary to enter upon an extended discussion of the various questions arising upon the record, and will content myself simply with an expression of my nonconcurrence in the view taken by the court as to the meaning and scope of certain provisions of the act. In my judgment the act, reasonably and properly construed, according to its language, includes within its prohibitions a railroad company transporting coal, if, at the time, it is the owner, legally or equitably, of stock—certainly, if it owns a majority or all the stock—in the com-

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pany which mined, manufactured, or produced, and then owns, the coal which is being transported by such railroad company. Any other view of the act will enable the transporting railroad company, by one device or another, to defeat altogether the purpose which Congress had in view, which was to divorce, in a real, substantial sense, production and transportation, and thereby to prevent the transporting company from doing injustice to other owners of coal.

PALMER TRANSFER CO. v. ANDERSON.

(Court of Appeals of Kentucky, Jan. 7, 1909.)

[115 S. W. Rep. 182.]

Carriers—Regulation—Use of Carrier's Premises.*—A contract by which a railroad gave a transfer company the exclusive use of a part of its station grounds along which there was a gravel walk, and which was most convenient to the trains on which the greater number of passengers arrived and departed, so that such passengers were compelled to walk 150 feet past the transfer company's cabs before reaching a place where other cabs could stand, gave the transfer company a practical monopoly of the transfer business, and was void.

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Suit by Harry Anderson against the Palmer Transfer Company. From a judgment for plaintiff, defendant appealed. Affirmed.

Wheeler, Hughes & Berry and *Bradshaw & Bradshaw*, for appellee.

Crice & Ross, for appellant.

CLAY, C. Plaintiff, Harry Anderson, the owner of a line of cabs, busses, and baggage wagons in the city of Paducah, instituted this action against the defendant, Palmer Transfer Company, a corporation engaged in a similar business, to enjoin the latter from interfering with him in the use of a certain plot of ground adjoining the approach to the Union Depot in Paducah, and also to recover damages for being deprived of the right to use the plot of ground. Defendant's demurrer to the petition being overruled, it then filed answer, denying the allegations of the petition and claiming that it had the right to use the plot of ground in question under and by virtue of a contract which it made with the Illinois Central Railroad Company, by the terms of which it agreed to meet all incoming and outgoing trains with

*See foot-note of *Oregon Short Line R. Co. v. Davidson* (Utah), 28 R. R. R. 201, 51 Am. & Eng. R. Cas., N. S., 201.

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its cabs and busses, and serve the traveling public in an orderly manner, and further bound itself to transport passengers and baggage from all parts of the city of Paducah at the rate of 25 cents for each passenger and 25 cents for each piece of baggage, and also to perform certain other covenants mentioned in the contract, all of which defendant alleged it had fully and faithfully performed. By reply plaintiff alleged that the contract between the defendant and the railroad company gave to the defendant the exclusive use of a large part of the approach lying nearest to the depot and best equipped with improved walks, and thereby gave to the defendant a monopoly of the passenger and baggage carrying business to and from the depot, that on this account the contract relied upon by the defendant was against public policy, and therefore null and void. By amended petition, the plaintiff also charged that it was the duty of the railroad company to provide comfortable and convenient accommodations for the traveling public, and that it had failed to perform that duty to the public by granting the contract in controversy, which created a practical monopoly of the passenger and baggage carrying business. Depositions were taken, and the case submitted to the chancellor, who granted the injunction prayed for by plaintiff, but declined to give him any damages. From that judgment, the Palmer Transfer Company prosecutes this appeal.

The facts in this case are as follows: The Illinois Central Railroad Company and the Nashville, Chattanooga & St. Louis Railway Company have a union station in the city of Paducah. Leading southward from Caldwell street towards the depot building there is a roadway or approach 64 feet wide and 315 feet long. A platform or walkway extends along the south end of the roadway its entire width—64 feet. A sidewalk or platform of gravel or crushed stone, 15 feet in width, with concrete or stone curb, extends along the west side of the roadway its entire length of 315 feet. The roadway and the depot are between the main tracks of the two railroad companies. The passengers board or alight from the Illinois Central trains on the west side of the depot and roadway, and from the Nashville, Chattanooga & St. Louis trains on the east side thereof. The space occupied by the Palmer Transfer Company is on the west side of the roadway. This space is 32 feet wide, and extends from the south end of the roadway towards Caldwell street 150 feet. This space being taken out of the driveway leaves 32 feet on the east side and 115 feet on the west side that is open to public use. Out of the 32 feet, however, about 8 feet is occupied by the street car line, and, taking into consideration the danger of being near the street car line or the railroad tracks, the space left next to the depot building is about 20 feet. This 20 feet is fairly convenient of access and approach to the Nash-

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ville, Chattanooga & St. Louis trains, but by far the larger portion of the traffic to and from the union depot is over the tracks of the Illinois Central. In order for passengers from the Illinois Central to reach the cabs or busses of those transfer men who are not permitted to occupy the space in question, they must proceed down the platform and pass by the cabs or busses of the Palmer Transfer Company for a space of 150 feet.

Plaintiff Anderson testified that he had on an average three cabs to meet trains at the Union Station, and that the Palmer Transfer Company had four; that it was much more convenient for passengers leaving the Union Station to use the carriages of the Palmer Transfer Company because these carriages were closer, and a portion of the approach set aside for that company had a gravel walkway along its entire length, from which passengers could step into its carriages; that this walkway was not constructed by the Palmer Transfer Company for its own convenience, but was a part of the general depot improvements and conveniences provided by the railroad company for the public; that, in order for a passenger to get to the carriages of the appellee or any other cabmen except the Palmer Transfer Company, they would have to walk a distance of 150 feet past a long line of carriages of appellant; and that, under ordinary circumstances, no passenger would do this. He further stated that he had been in the transfer business since May, 1902, during all of which time the Palmer Transfer Company had excluded him from the use of that portion of the approach in controversy, and that his loss on this account amounted to at least \$2 per day up to the day of filing the suit. The witness further testified to the fact that the Palmer Transfer Company had changed the post dividing the space occupied by it from the rest of the roadway, and he was denied admittance to the space so occupied by it, and upon one occasion when he had entered this space a warrant was issued against him by the officers of the Palmer Transfer Company.

For the defendant R. L. Palmer testified that his company had transfer agents on the various trains, and that the principal part of his business consisted in carrying passengers and the baggage of passengers who had previously contracted with its train agents. Witness produced the contracts between his company and the railroad companies, and made them a part of his deposition. He stated that there was plenty of room for the busses and wagons of other transfer agents to occupy. Witness further testified that his company might secure more business by having the contracts giving the company the right to occupy the place in dispute.

In the case of *McConnell v. Pedigo & Hays*, 92 Ky. 465, 18 S. W. 15, this court had under consideration a question similar to the one involved in the case at bar. In that case the railroad company granted to McConnell, to the exclusion of all other

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persons engaged in a like business, the right to come upon its depot grounds in Glasgow, Ky., with his vehicles for the purpose of receiving and depositing passengers and freight. The contract was being carried out by McConnell when the firm of Pedigo & Hays undertook to transfer passengers to and from the depot, and claimed the right to stand their hacks upon the grounds near and at the depot, when in so doing they did not interfere with the business of the railroad company. McConnell sought an injunction against Pedigo & Hays, and, his petition being dismissed, he appealed to this court. It was here held that a regulation of a railroad that discriminates by driving from its depot those who are engaged in a public employment and whose duty it is to provide for their guests and the traveling public, resulting in a monopoly of the particular business, is unauthorized by the charter of a railroad company, and in palpable violation of the rights of others. While it may be admitted that the English rule and the rule of several other states is different from that announced above (*Barker v. Midland Railway Co.*, 86 English Common-Law Reports, 46; *Old Colony Railroad Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661; *Hedding v. Gallagher*, 72 N. H. 377, 57 Atl. 225, 64 L. R. A. 811), yet the courts of several states hold to the view adopted by this court (*Montana Union Ry. Co. v. Langlois*, 9 Mont. 419, 24 Pac. 209, 8 L. R. A. 753, 18 Am. St. Rep. 745; *Kalamazoo Cab & Buss Co. v. Sootsma*, 84 Mich. 194, 47 N. W. 667, 10 L. R. A. 819, 22 Am. St. Rep. 693), and in the recent case of *Indianapolis Railway Co. v. Dohn*, 153 Ind. 10, 53 N. E. 937, 45 L. R. A. 427, 74 Am. St. Rep. 274, the case of *McConnell v. Pedigo & Hays*, *supra*, was cited with approval. That being the case, we see no reason for changing the rule announced by this court.

Counsel for appellant, however, insist that the rule laid down in the case of *McConnell v. Pedigo & Hays* has no application to this case, because abundant space is left for Anderson and other hackmen, and that the contracts between appellant and the railroad companies do not create a monopoly. We confess, however, that we are unable to differentiate this case from that cited. While there is some space still left for Anderson and the other hackmen to occupy, it is so inconveniently located with reference to the larger part of the business of carrying passengers and baggage that the giving to appellant of the space occupied by it constitutes such a preference over other transfer men as to afford it a practical monopoly of the business. There is, in effect, no difference between giving a transfer company the exclusive right to occupy the depot grounds and the right to occupy that portion thereof which necessarily results in its securing by far the larger share of the business. We therefore conclude that appellant's contracts, operating as they do to give it a practical monopoly,

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are null and void, and that appellant has no right to occupy the space in question to the exclusion of appellee and other hackmen.

We are inclined to the opinion that the chancellor did not err in refusing to allow the plaintiff damages.

For the reasons given, the judgment is affirmed.

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(Supreme Judicial Court of Massachusetts, Worcester, May 18, 1909.)

[88 N. E. Rep. 420.]

Carriers—Carriage of Goods—Persons to Whom Delivery May Be Made.—The addressing of a package to a consignee in the care of a third person, as between the consignor, the consignee, and the carrier, and as to the liability of the latter, and in the absence of known limitations upon the scope of the authority given, confers upon such third person the right to receive the goods, and ordinarily constitutes him the proper person to whom to make delivery.

Courts—Decisions of United States Courts as Authority in State Courts—Federal Statutes.—As the Supreme Court of the United States is the final arbiter as to the meaning of a federal statute, its definition of the words contained in the statute is binding upon state courts.

Commerce—Interstate Commerce—Delivery by Carrier Wholly within State.*—The final link in an interstate shipment may be through a carrier wholly within the terminal state, and such carrier may be another railroad or a horse and wagon.

Intoxicating Liquors—Defenses—Prosecutions—Questions for Jury.—Evidence, in a prosecution for violation of St. 1906, p. 437, c. 421, § 1, and Rev. Laws, c. 100, § 49, as amended by St. 1907, p. 485, c. 517, relating to the transportation of intoxicating liquors into cities, held to make the question of whether defendant, in delivering a shipment of liquor, was acting as an interstate carrier in delivering an interstate shipment one for the jury.

Constitutional Law—Statutes—Construction in Favor of Constitutionality.—A statute which would be unconstitutional as applied to a certain class of goods and constitutional as to another class may be held to have been intended to apply only to the latter class, if it seems in harmony with the general purpose of the Legislature.

Intoxicating Liquors—Offenses—Transportation—Validity of Statutes.—St. 1906, p. 437, c. 421, providing in section 1 that no person or corporation, except a railroad or street railway corporation, shall

*See second foot-note of *Patterson v. Missouri Pac. Ry. Co.* (Kan.), 29 R. R. R. 695, 52 Am. & Eng. R. Cas., N. S., 695; foot-note of *United States v. Colorado, etc., Co.* (C. C. A.), 27 R. R. R. 758, 50 Am. & Eng. R. Cas., N. S., 758.

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transport liquors for hire into or in a city in which licenses of the first five classes for the sale of intoxicating liquors are not granted without first being granted a permit so to do, and Rev. Laws, c. 100, § 49, as amended by St. 1907, p. 485, c. 517, providing that no person or corporation not regularly conducting a general express business, except a railroad corporation or a street railway corporation authorized to carry freight or express, shall receive liquors for transportation for hire for delivery in such cities, are constitutional, so far as they apply to business not interstate in its character.

Constitutional Law—Statutes—Construction in Favor of Constitutionality.—As St. 1906, p. 437, c. 421, which provides in section 1 that no person or corporation, except a railroad or street railway corporation, shall transport liquors for hire into or in a city in which licenses of the first five classes for the sale of intoxicating liquors are not granted without first being granted a permit so to do, would be unconstitutional if it included interstate shipments, the intention of the Legislature was to have it apply only to intrastate shipments.

Intoxicating Liquors—Power to Control Traffic—State Laws.—Liquor which is the subject of an interstate shipment does not come under the control of state laws until it passes into the actual or constructive possession of the consignee, and such delivery to the consignee may be made at his residence, place of business, or at some common depot of consignment.

Intoxicating Liquors—Transportation—Persons Liable—Express Companies—"Express Business."—Under St. 1907, p. 957, c. 586, providing for the taxation of express companies, and St. 1906, p. 485, c. 463, pt. 1, § 7, and St. 1908, p. 637, c. 599, defining the authority of the Board of Railroad Commissioners over express companies, and St. 1906, p. 486, c. 463, pt. 1, § 13, and St. 1906, pp. 564, 567, 580, pt. 2, §§ 189, 197, 246, and Rev. Laws, c. 70, § 3, and Rev. Laws, c. 106, § 62, as amended by St. 1906, p. 445, c. 427, and Rev. Laws, c. 95, § 7, and chapter 208, § 26, as amended by St. 1906, p. 223, c. 261, § 1, relating to express companies, the term "express business" is not confined to carriers using railroads and railways; and Rev. Laws, c. 100, § 49, as amended by St. 1907, p. 485, c. 517, providing that no person or corporation not regularly conducting a general "express business," except a railroad corporation or a street railway corporation authorized to carry freight or express, shall receive liquors for transportation for hire for delivery in a city in which licenses of the first five classes are not granted, includes those who carry in their own vehicles, as well as those who go on trains and steamers, but it involves the idea of regularity as to route and time, or both.

Intoxicating Liquors—Prosecutions—Sufficiency of Evidence—Transportation of Liquors.—Evidence, in a prosecution under Rev. Laws, c. 100, § 49, as amended by St. 1907, p. 485, c. 517, forbidding any person or corporation not regularly conducting a general "express business," except a railroad corporation or a street railway corporation authorized to carry freight or express, to receive liquors for

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transportation for hire for delivery in a city, in which licenses of the first five classes are not granted, held to show that defendant was not conducting a general express business.

Criminal Law—Trial—Argument of Counsel—Control by Court.—It is discretionary with the trial court either to direct counsel to cease to pursue an objectionable line of argument or to permit him to proceed and give adequate instructions to protect the rights of the parties; and where the argument is wholly foreign to the issues, but based on facts excluded from the consideration of the jury, it is wiser, to stop counsel, but where it is directed to subjects germane to matters before the jury and only incidentally open to objection, and is not prolonged, the court may refuse a request to interfere and correct the error by instructions, as conducing to the orderly and dignified conduct of the trial.

Criminal Law—Trial—Arguments of Counsel—Comments on Failure to Produce Evidence.—Where incriminating evidence has been introduced by the commonwealth, and explanations consistent with his innocence could be produced by defendant through witnesses other than himself, more likely to be known to him than the representatives of the government, and he does not call such witnesses, his failure to do so is fair matter for comment, and is not within the protection of the Constitution.

Intoxicating Liquors—Transportation—Presumption of Innocence.—Defendant, prosecuted under Rev. Laws, c. 100, § 49, as amended by St. 1907, p. 485, c. 517, forbidding any person or corporation not regularly conducting a "general express business," except railroad and street railway corporations, to receive liquors for transportation for hire in a city in which licenses of the first five classes are not granted, is presumed to be innocent until his guilt is shown; but there was no presumption that defendant was carrying on a general express business.

Intoxicating Liquors—Transportation—Presumption of Innocence.—Defendant was liable where it was shown that it was a carrier of intoxicating liquors only, though it held itself out as ready to do a general express business, as the word "general," in the statute, imports something more than a casual, infrequent, and incidental carriage of goods other than intoxicating liquors, and means that the major part of the business must be the carriage of a variety of goods commonly the subject of transportation by express companies, and the word "regularly" means fixedness and permanence in the character of the business, and also indicates stated times and established routes of conveyance.

Exception from Superior Court, Worcester County; Wm. Cushing Wait, Judge.

The People's Express Company was convicted of transporting liquors in a city without first being granted a permit to do so, and alleges exceptions. Exceptions sustained.

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George S. Taft, Dist. Atty., and Ernest I. Morgan, Asst. Dist. Atty., for the Commonwealth.

David I. Walsh and Thos. L. Walsh, for defendant.

RUGG, J. The defendant was convicted upon two complaints, one for the violation of St. 1906, p. 437, c. 421, and the other for the violation of Rev. Laws, c. 100, § 49, as amended by St. 1907, p. 485, c. 517. St. 1906, c. 421, § 1, provides that "no person or corporation, except a railroad or street railway corporation, shall, for hire or reward, transport spirituous liquors into or in a city or town in which licenses of the first five classes for the sale of intoxicating liquors are not granted, without first being granted a permit so to do as hereinafter provided." Rev. Laws, c. 100, § 49, as amended by St. 1907, p. 485, c. 517, § 1, after making several regulations respecting the marking of packages or vessels containing intoxicating liquor for transportation into cities and towns where licenses of the first five classes are not granted, provides further that "no person or corporation not regularly and lawfully conducting a general express business, except a railroad corporation or a street railway corporation authorized to carry freight or express, shall receive such liquors for transportation for hire or reward for delivery in a city or town in which licenses of the first five classes are not granted, nor transport or deliver such liquors in such cities or towns."

The defendant assails these statutes as invalid under article 1, § 8, of the federal Constitution which vests control of interstate commerce in Congress. This contention makes necessary a critical examination of the facts, in order to ascertain whether any question of interstate commerce is involved. The evidence tended to show that on August 7, 1907 (transactions on this day being identical in kind with those occurring on several other days in the same month), the Crescent Bottling Company delivered to the Boston & Maine Railroad, at Walpole, in the state of New Hampshire, 20 different packages containing beer. These were plainly and legibly marked, as required by law, and directed to 19 differently named individuals at Gardner in this commonwealth. The goods were shipped on bills of lading made out by the Crescent Bottling Company, who were named as consignors. There was a shipping order, which named the Crescent Bottling Company as shipper and under a heading. "Marks" (apparently indicating the marks upon the several packages) appears this: "care People's Express Co., Consignees." Then follow one below another, the names of the 19 persons to whom the packages were directed. One Sullivan, an agent of the Boston & Maine Railroad, at Walpole, who had charge of this and other like shipments, testified that the goods were "all consigned in care of the People's Express Company, Gardner, Mass.," and that these goods were "consigned by the Crescent Bottling Company to the People's Express Company, Gardner, Mass." No separate

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freight charge was made by the railroad for each package, but a lump sum was charged for all goods shipped in this way on a given day, at a lesser rate for a number of packages in bulk in care of the People's Express Company than for the same number of packages as distinct shipments to the individuals named on each package. The railroad agent in New Hampshire also testified "that these packages * * * were put in a section of the car by themselves, and that if there were goods enough of the People's Express Company to take an entire car, and if he had no other goods to go to Gardner except the goods of the People's Express Company, they were placed in a car by themselves. This car was not devoted to the People's Express Company. * * *" On arrival of the car in Gardner the packages were unloaded by employees of the Boston & Maine Railroad, and placed in its freight house, and there delivered to the defendant, which paid the freight, amounting on the 20 packages to \$2.19. One voucher was made in triplicate for the entire shipment, and this was receipted by the defendant at the time of delivery to it. It kept proper books of record for the intoxicating liquor handled by it (as required by the statute) and receipts for all such liquor delivered to individuals, collecting a charge of 25 cents, which, as might have been found from a statement by the treasurer of the defendant, "was money which the express company received in payment for transportation of the packages." The defendant had not been granted any permit as required by St. 1906, c. 421, nor does it appear that it had ever applied for and been refused such a permit. Although it was agreed as a fact at the trial that no permits had been granted in the town of Gardner during the period covered by these complaints, nothing more than this bald fact is disclosed on the record.

1. It is necessary first to inquire whether the ruling of the superior court to the effect that no question of interstate commerce was involved and that interstate transit ceased when the goods were delivered in Gardner to the defendant can be sustained.

The People's Express Company was in no sense the interstate carrier. It did not receive, have custody of or any relation to the goods at the point of shipment. The liquors were delivered to the Boston & Maine Railroad, which alone was the interstate carrier and which had the continuous possession of them thereafter, until they were placed in its freight station in Gardner. No messenger of the defendant accompanied the goods from the point of shipment in New Hampshire to their destination in this commonwealth. The defendant was not named as consignee in the shipping order, but was referred to by the phrase, "in care of People's Ex. Co." The addressing of a package to a consignee in the care of a third person, as between the consignor and

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consignee and the carrier, and as to the liability of the latter, and in the absence of known limitations upon the scope of the authority given (see *Claffin v. Boston & Lowell Railroad Co.*, 89 Mass. 341), confers upon such third person the right to receive the goods, and ordinarily constitutes him the proper person to whom to make delivery (*Russell v. Livingston*, 16 N. Y. 516; *C. & N. W. R. R. Co. v. Merrill*, 48 Ill. 425; *Ela v. Am. Merchants' Union Ex. Co.*, 29 Wis. 611, 9 Am. Rep. 619). This circumstance may be weighty evidence as to who is in fact the consignee and as to whether such caretaker is the agent of the consignor or of the consignee. Whether the defendant may have been found to have been connected with the interstate transportation involves an examination of federal statutes and decisions. Whatever may be the precise meaning of the words "interstate commerce," and their significance is certainly very broad (see *Hopkins v. United States*, 171 U. S. 578-597, 19 Sup. Ct. 40, 43 L. Ed. 290), goods brought from one state into another at some time reach a stage where they are no longer immune by reason of the intrastate commerce clause from any otherwise legal intrastate regulation.

Respecting intoxicating liquors, that point of time is fixed by the act of Congress of August 8, 1890, known as the "Wilson Act" (Act Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177]), to be "upon arrival" in the state. As the Supreme Court of the United States is the final arbiter as to the meaning of a federal statute, its definition of these words is binding upon this court. The constitutionality of the Wilson act was established in *Re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572. The meaning of the particular words now in question was first discussed in *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088, where it was said: "Interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of the state to attach to an interstate commerce shipment whilst the merchandise was in transit under such shipment and until its arrival at the point of destination and delivery there to the consignee." The contention that arrival meant physical presence at the boundary line of the state was held to be unsound. In *Vance v. Vandercook Co.* No. 1, 170 U. S. 438, 451, 18 Sup. Ct. 674, 679, 42 L. Ed. 1100, the issue was the constitutionality of a statute of South Carolina, which permitted residents of the state to import liquor only after communicating this purpose to the state chemist, and prohibited nonresidents from shipping into the state unless permission was granted. It was said that "the interstate commerce clause of the Constitution guarantees the right to ship merchandise from one state into another, and protects it until the termination of the shipment by delivery at the place of consignment, and this right is wholly unaffected by the act of Congress which allows

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authority to attach to the original package before sale but only after delivery." *American Express Co. v. Iowa*, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417, *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632, *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 25 Sup. Ct. 552, 49 L. Ed. 925, and *Foppiano v. Speed*, 199 U. S. 501, 25 Sup. Ct. 138, 50 L. Ed. 288, discuss the Wilson act, but contain no definition of "arrival." *Heyman v. Southern Railroad*, 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178, held that goods received from another state and placed in the freight warehouse of the carrier, without any act of receipt by the consignee or any unreasonable delay on his part, had not arrived, within the meaning of that act. *Adams Express Co. v. Kentucky*, 206 U. S. 139, 27 Sup. Ct. 606, 51 L. Ed. 987, and two cases immediately following it in the same volume decided upon its authority, affirmed the right of the citizen of one state to have delivered to him liquor purchased in another. This may mean delivery at his residence, if this is the contract. *Rearick v. Pennsylvania*, 203 U. S. 507, 27 Sup. Ct. 159, 51 L. Ed. 295; *State v. Intoxicating Liquors*, 102 Me. 385, 67 Atl. 312, 120 Am. St. Rep. 504; *Loverin & Browne Co. v. Travis*, 135 Wis. 322, 115 N. W. 829; *C., N. O. & T. P. R. R. Co. v. Com. (Ky.)*, 104 S. W. 394; *State v. Adams Ex. Co. (Ind.)* 85 N. E. 337, 966.

The final link in an interstate shipment may be through a carrier wholly within the terminal state. This is plain when a railroad other than the interstate carrier is completing the chain of interstate transportation. It must be true when a real carrier is completing it by horse and wagon. There is strong ground for the argument that the defendant was not a link in interstate carriage, but was at best the agent for the consignees. Some of the testimony taken literally and some inferences from the acts of the defendant in dealing with the goods tend to show that it was itself the consignee. But the evidence is hardly so conclusive as to render impossible a finding that there were real purchases, by the several persons named in the shipping order, from the Crescent Bottling Works in New Hampshire, and that the defendant had no other connection with the goods than to conclude the interstate transportation rendered necessary by the purchase in a foreign jurisdiction. Unless such a finding was in reason impossible, the ruling of the lower court on this branch of the case cannot be sustained. On the whole it was a question of fact for the jury to determine under appropriate instructions whether the transaction to which the defendant was a party was legitimate interstate commerce, or whether, while clothed in garments of legal appearance, it was in truth and substance a subterfuge designed to circumvent the laws of this commonwealth as to intoxicating liquors and the defendant's connection with it as carrier a mere pretense, or whether it was the agent

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of the several persons, named as consignees, to receipt for the goods in their behalf, or whether in fact it was itself the consignee. It becomes necessary therefore to consider the terms of the statutes under which the complaints are framed, to determine their scope and to pass upon their constitutionality in respect of federal control over interstate commerce. Their language is general and includes all deliveries having their inception within the commonwealth. As was said by Knowlton, C. J., in *Attorney General v. Electric Storage Co.*, 188 Mass. 239, 74 N. E. 467: "A statute which would be unconstitutional as applied to a certain class of cases, and is constitutional as applied to another class, may be held to have been intended to apply only to the latter class, if this seems in harmony with the general purpose of the Legislature." There is ample scope for the operation of the statutes in question in respect of trade having its beginning and ending within the limits of this commonwealth. Even though much the larger part of the business of a given individual may be interstate commerce, yet if it does engage in local trade, requirement for a permit would be a valid regulation respecting such intrastate transactions. The substance of these statutes has been held heretofore to be within the constitutional power of the Legislature as confined to local commerce. *Commonwealth v. Intoxicating Liquors*, 172 Mass. 311, 52 N. E. 389. There is no occasion for reviewing this decision or doubting its binding force. Hence these statutes are constitutional so far as they apply to business not interstate in its character. *Osborn v. Florida*, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586; *Kehrer v. Stewart*, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663; *Armour Packing Co. v. Lacey*, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. Ed. 451.

It is plain from inspection of the provisions of Rev. Laws, c. 100, § 49, as amended by St. 1907, c. 517, that it was not intended to apply to interstate commerce. The first sentence of the section is a prohibition to consignors or sellers. Such a statute can have no extraterritorial effect. It cannot act upon sellers or consignors outside of Massachusetts. The second sentence is an inhibition on carriers receiving such goods. This, too, can have no validity except within this commonwealth. Moreover, if it be assumed to have been intended to relate to interstate commerce, it is apparent that its terms constitute restraint and interference with that which must under the federal Constitution be free and unrestricted so far as state laws are concerned. It follows that the scope of this statute according to its terms and the intent of its framers includes only such transportation of intoxicating liquors as lies wholly within this commonwealth. It may be noticed as bearing upon the soundness of this view that the Congress of the United States has, by an act approved March 4, 1909 (Act March 4, 1909, c. 321, 35 Stat. 1088), and entitled "An act to codify, revise and amend the penal laws of the United

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States," in sections 238, 239, and 240, comprehensively covered this general field, so far as it relates to interstate commerce.

A majority of the court is of opinion that St. 1906, c. 421, if held to include interstate shipments, would be unconstitutional, as being lawful interference with interstate commerce, and that therefore it was intended to apply only to intrastate shipments. The Wilson act, as interpreted by the Supreme Court of the United States, insures delivery to the consignee of intoxicating liquor, which is transported as interstate commerce, free from and regardless of all prohibitive statutes of the several states. As pointed out above, such delivery may be at the residence or place of business of the consignee as well as at some common depot of consignment. The liquor is safe from state laws, until it passes into the actual or constructive possession of the consignee. *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088; *Vance v. Vandercook Co. No. 1*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100; *American Ex. Co. v. Iowa*, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417; *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 25 Sup. Ct. 552, 49 L. Ed. 925; *Foppiano v. Speed*, 199 U. S. 501, 26 Sup. Ct. 138, 50 L. Ed. 288; *Heyman v. Southern R. R.*, 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178; *Adams Ex. Co. v. Kentucky*, 206 U. S. 139, 27 Sup. Ct. 609, 51 L. Ed. 993. If the statute was construed as applying to interstate commerce it would constitute a restriction upon its freedom and therefore beyond the power of the state. This is not my own view. It seems to me that, St. 1906, c. 421, in section 2, being mandatory and the required fee for the permit nominal, and not being by its terms restricted to commerce wholly within the commonwealth but comprehensively broad in its language, and the regulation relating only to use of highways within the several municipalities, the control of which is referable to the police power of the several states (*New Orleans Gaslight Co. v. Louisiana Light Co.*, 115 U. S. 650, 661, 6 Sup. Ct. 252, 29 L. Ed. 516; *Fair Haven R. R. Co. v. New Haven*, 203 U. S. 379-390, 27 Sup. Ct. 74, 51 L. Ed. 237), it falls within that group of statutes incidentally but not primarily and mainly affecting interstate commerce and hence constitutional as within the police power of the several states. The cases, which lead my mind to this conclusion, are collected in a foot note.¹ But in this respect

¹*Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; *Missouri, Kansas & Texas Railway v. Haber*, 169 U. S. 613, 18 Sup. Ct. 488, 42 L. Ed. 878; *Western Union Telegraph Co. v. New Hope*, 187 U. S. 419, 23 Sup. Ct. 204, 47 L. Ed. 240; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995; *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; *Nashville, etc., Railway Co. v. Alabama*, 128 U. S. 96-101, 9 Sup. Ct. 28, 32 L. Ed. 352; *New York, New Haven & Hartford Railroad Co. v. New York*, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853; *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819; *Reid v. Colorado*, 187 U. S.

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I am overborne by the opinion of my Associates. The result is that as there was evidence from which a jury might find that the defendant was engaged in interstate commerce and as such commerce is not subject to the terms of the statutes, there was error in the instructions to the effect that no question of interstate commerce was involved. The defendant's prayers numbered 1, 5, 6, 7, 8, 9, and 10 were rightly refused as being either inaccurate or inapplicable to the evidence.

As the cases must go back for a new trial we determine such other exceptions as are likely to arise in the event of a finding as a fact that the defendant was not engaged in interstate commerce.

2. The defendant argues, as to the complaint under Rev. Laws, c. 100, § 49, as amended by St. 1907, c. 517, that there was no adequate evidence to sustain a finding that it was not doing "a general express business," within the meaning of the words as used in said statute. Our statutes do not define what is meant by "express business." The language of St. 1907, p. 957, c. 586, as to the taxation of express companies, and St. 1906, p. 485, c. 463, pt. 1, § 7, and St. 1908, p. 637, c. 599, as to the authority of the board of railroad commissioners over express companies, and St. 1906, p. 486, c. 463, pt. 1, § 13, and pages 564, 567, 580, pt. 2, §§ 189, 197, 246, read in connection with Rev. Laws, c. 70, § 3, chapter 106, § 62 as amended by St. 1906, p. 445, c. 427, chapter 95, § 7, and chapter 208, § 26, as amended by St. 1906, p. 223, c. 261, § 1, shows that the phrase includes persons engaged in express business other than those using railroads and

137, 23 Sup. Ct. 92, 47 L. Ed. 108; *Rasmussen v. Idaho*, 181 U. S. 198, 21 Sup. Ct. 594, 45 L. Ed. 820; *Western Union Telegraph Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105; *Silz v. Hesterberg*, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. —; *Asbell v. Kansas*, 209 U. S. 251, 28 Sup. Ct. 485, 52 L. Ed. 778; *Bacon v. Walker*, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499; *Jones v. Brim*, 165 U. S. 180, 17 Sup. Ct. 282, 41 L. Ed. 677; *Wilson v. Eureka City*, 173 U. S. 32, 19 Sup. Ct. 317, 43 L. Ed. 603; *Pennsylvania Ry. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268; *C., M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; *Morgan Steamship Co. v. Louisiana*, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. Ed. 237; *Cooley v. Board of Wardens*, 12 How. 299-320, 13 L. Ed. 996; *Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. Ed. 688; *Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. Ed. 377; *Martin v. Pittsburg & Lake Erie R. R. Co.*, 203 U. S. 284, 27 Sup. Ct. 100, 51 L. Ed. 184; *Miss. R. R. Com. v. Ill. Cent. R. R. Co.*, 203 U. S. 535, 27 Sup. Ct. 90, 51 L. Ed. 209; *Southern Ry. Co. v. King*, 160 Fed. 332, 87 C. C. A. 284; *Railway Co. v. Fuller*, 17 Wall. 560, 21 L. Ed. 710; *Louisville & Nashville R. R. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849; *Richmond & Allegheny R. R. Co. v. Patterson Tobacco Co.*, 169 U. S. 311, 18 Sup. Ct. 335, 42 L. Ed. 759; *C., B. & Q. Ry. Co. v. Drainage Com.*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596; *State v. C., M. & St. P. Ry. Co. (Wis.)*, 117 N. W. 686; *De Lorme v. Atlantic Coast Line Ry. Co.*, 79 S. C. 370, 60 S. E. 440; *C., R. I. & P. Ry. Co. v. State (Ark.)*, 111 S. W. 456; *Com. v. Mulhall*, 162 Mass. 496, 39 N. E. 183, 44 Am. St. Rep. 387.¹ See Rev. Laws, c. 52, §§ 14, 16, 18, 19, 23, 31.

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railways. But an express business is something different from a trucking business. It is a term of modern birth, having first been used in its present significance in 1839. Express Cases, 117 U. S. 1-23, 6 Sup. Ct. 542, 628, 29 L. Ed. 791; Pfister v. Central Pacific R. R., 70 Cal. 169, 179, 11 Pac. 686, 59 Am. Rep. 404; sub nomine, Century Dict. The proportion of express business conducted through the instrumentality of railroads, steamboats and railways is so vastly in excess of that carried on in any other way as to lead some courts to assert that "such a thing as an express company disassociated from transportation by rail or steamer is unknown." Pacific Express Co. v. Seibert (C. C.) 44 Fed. 310-318. But generally the words "express business," and particularly as used in the statute now under consideration, have a more comprehensive meaning and include a common carrier who transports packages of merchandise under the personal and immediate charge of himself or agent over a regular course, between certain termini, with a speed, or individual care, or both, greater than obtains as to ordinary freight. It may include thus those who carry in their own vehicles, as well as those who go upon trains and steamers owned by others. But it involves "the idea of regularity as to route or time or both." Retzer v. Wood, 109 U. S. 185, 3 Sup. Ct. 164, 27 L. Ed. 900. In popular speech as well as matter of law, it may include the transportation wholly upon highway vehicles between contiguous or neighboring localities. See Brooks v. Shaw, 197 Mass. 376, 84 N. E. 110. Tried by this test, it is obvious that the evidence was ample that the defendant was not conducting a general express business. It is open to grave doubt whether it was doing an express business at all. It may have been found to be acting as truckman, possessing none of the elements which are the essential characteristics of an expressman. It merely carried to various persons named as consignees the goods brought into the town by the Boston & Maine Railroad and deposited by it in its freight depot. See Retzer v. Wood, *ubi supra*. Nor was its business general even as a truckman. On the evidence, it carried almost nothing save intoxicating liquor. It was incorporated with power to do an express business, and went by the name of express company. But to call a truckman an expressman does not make him one. The instructions given by the court upon what constitutes a general express business were sufficiently favorable to the defendant.

3. The district attorney argued to the jury that the defendant was in a position to prove that it was doing a general express business, if it was a fact, and that, having failed to offer such proof, this fact should be considered by the jury. The defendant seasonably objected to the argument, and excepted to the refusal of the presiding justice to interfere. The single sentence excerpted from the argument of the district attorney, standing

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alone, is open to the objection that it asked for an inference, unfavorable to the defendant, from its failure to call its own officers as witnesses. But the defendant has no valid exception. Although empowered so to do, it is ordinarily discretionary with a trial court either to direct counsel to cease to pursue an objectionable line of argument or to permit him to proceed, and give adequate instructions in his charge to protect the rights of the parties. Where the argument is wholly foreign to the issues or based upon facts excluded from the consideration of the jury, it is wiser to stop the counsel. But where it is directed to subjects generally germane to the matters which the jury are to consider, and only incidentally open to objection, and is not prolonged, it may conduce to the orderly and dignified conduct of trials to refuse a request to interfere and to give ample instructions in his charge covering the point. *Sayles v. Quinn*, 196 Mass. 492, 82 N. E. 713. The trial court followed the latter course, and, having declined to stop the argument, gave full instructions in accordance with the well-settled principle that where incriminating evidence has been introduced by the commonwealth and explanations consistent with his innocence could be produced by the defendant through witnesses other than himself, more likely to be known to him than to the representatives of the government, and he does not call such witnesses, his failure in this respect is fair matter for comment, and is not within the protection of the Constitution. *Com. v. Finnerty*, 148 Mass. 162, 19 N. E. 215; *Com. v. McCabe*, 163 Mass. 98, 39 N. E. 777; *Com. v. Goldstein*, 180 Mass. 374, 62 N. E. 378, 91 Am. St. Rep. 311. See *McKim v. Foley*, 170 Mass. 426, 49 N. E. 625. The inference drawn by common sense and approved by the law is that such evidence if presented would be unfavorable to the defendant. *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711.

4. The defendant's third and fourth requests for rulings could not have been given, for the reason that they both asserted a presumption that the defendant was carrying on a general express business. There is no legal presumption of that nature. Simply because one is charged with transporting liquor where he does not carry on a general express business, does not create a presumption that in fact he carries on a general express business. He is only presumed to be innocent, until his guilt is proven, but not innocent for a particular reason. The instructions given upon this point were adequate.

5. The final contention of the defendant is that its prayer should have been granted to the effect that, if it held itself out as ready to do a general express business, it must be found not guilty. It is doubtful if there was any evidence that the defendant held itself out as doing an express business within the definition we have given to those words, or that it was anything more than a deliverer of parcels. But assuming that there was evi-

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dence, to which the prayer was applicable, it was not a correct statement of the law. The language of the statute, according to its plain intent, shows this. So far as material, it is: "No person or corporation not regularly and lawfully conducting a general express business." This describes a fact and not an intent, a physical act, not a state of mind. The statute is entitled "An act relative to the registration of carriers of intoxicating liquors," and must be read in the light of its manifest purpose. No matter how desirous one might be of doing a general express business, nor how widely he might advertise his facilities in this respect, if, nevertheless (after such reasonable time to enable establishment in business as had elapsed in the present case), the only trade that came to him was in intoxicating liquors, he could not be said to be really doing a general express business. The word "general" in the statute imports something more than a casual, infrequent, desultory and incidental carriage of goods other than intoxicating liquors, and means that the substantial and major part of the daily traffic must comprehend that variety of goods commonly the subject of transportation by express companies. The word "regularly" implies something of fixedness and permanence in the character of the business, although it may also relate to stated times and established routes of conveyance. In the case supposed, the carrier would be confined by the demands of his patrons to this specialty, no matter how anxiously he might desire to change the character of his business. Under these circumstances he would in truth and in fact be a "carrier of intoxicating liquors," within the meaning of those words as used in the statute, and not "regularly and lawfully conducting a general express business." The instructions upon this branch of the case were correct.

Exceptions sustained.

GAMBLE-ROBINSON COMMISSION CO. v. CHICAGO & N. W.
RY. CO.

(Circuit Court of Appeals, Eighth Circuit, March 22, 1909.)

[168 Fed. Rep. 161.]

Carriers—Interstate Commerce Act—No Discrimination by Demand of Prepayment of Charges.—An interstate carrier does not subject a consignee to an undue or unreasonable prejudice or disadvantage under section 3 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]) by exacting, after due notice to it, the prepayment of charges for transportation of all property consigned to it, while it does not require such charges to be paid in advance upon freight consigned to others similarly situated.

Carriers—Interstate Commerce Act Prohibits Undue and Unreasonable Prejudices and Disadvantages Only.—The interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) does not prohibit the giving of all preferences and advantages, or the production of all prejudices and disadvantages, but only those that are undue and unreasonable.

Carriers—Same—Carrier May Exercise Common-Law Rights Save as Prohibited by Interstate Commerce Act.—A common carrier has the right under the common law to demand the prepayment of charges for freight of one, and to give credit for them to another similarly situated.

An interstate common carrier is free to exercise all his rights under the common law to the full extent to which such exercise has not been made unlawful by the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]).

Carriers—Bad Motive for Lawful Act Creates No Cause of Action.—The fact that a carrier, for the purpose of injuring the business of a consignee, or harassing it, subjects it to a prejudice or disadvantage which is neither undue nor unreasonable, does not change the nature of the prejudice or disadvantage or create any cause of action therefor.

Carriers—Interstate Commerce Act—Prepayment of Charges for Freight—"Undue or Unreasonable Prejudice or Disadvantage"—Facts—Conclusion.—The plaintiff is a corporation engaged in buying, selling, and dealing for commissions in fruit, vegetables, and dairy products at Minneapolis, and it has offices at St. Paul, Rochester, and Mankato, in Minnesota, and Aberdeen in South Dakota. The defendant is a common carrier. It has railroad stations at those towns, and lines of railroad through those states and adjoining states. It is the custom and usage of such carriers, and of the defendant, for the terminal carrier to advance the charges of connecting lines upon freight consigned to parties at those stations, to transport the freight and

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deliver it to the consignees, also to receive freight at its stations and to transport and deliver it to the consignees, to hold the bills until the questions regarding the correctness of the charges on its lines and on the connecting lines have been adjusted, and then to collect the bills of the consignees. From a bad motive the defendant, after notice, refused to advance charges to connecting lines, to receive and transport freight consigned to the plaintiff, unless the charges upon it for transportation were prepaid, while it continued to give credit to other consignees similarly situated according to the usage and custom.

Held: These acts did not subject the plaintiff to undue or unreasonable prejudice or disadvantage within the meaning of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]).

Hook, Circuit Judge, dissenting.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Minnesota.

The alleged error in this case is that the court below sustained a demurrer to the plaintiff's complaint, and the material facts alleged therein were these: The plaintiff is a corporation engaged in buying and selling fruit, vegetables, farm and dairy products, and in a general commission business in these commodities at the city of Minneapolis, in the state of Minnesota, and it has branch offices at St. Paul, Rochester, and Mankato in that state, and at Aberdeen in South Dakota. The defendant is a railroad corporation and a common carrier. It has offices, agents, and agencies in St. Paul and Minneapolis. It owns and operates railroads in Iowa, Illinois, Minnesota, Dakota, and Wisconsin, and it has direct connections, by means of its own or other railroads, between its stations in those states and St. Paul, Minneapolis, Mankato, Rochester, and Aberdeen. Prior to December 15, 1906, it was the uniform custom and usage of railroad carriers, and of the defendant, to accept shipments of the products that have been named at local stations without the prepayment of freight, to take from the shipper a written guaranty of such payment, to deliver the products to the consignees in the cities named, and afterwards to collect of these consignees the charges for transportation, "and in case of any question arising as to the correctness of any transportation charge upon the line of the terminal or any connecting carrier, such terminal carrier takes the matter up for adjustment and holds the freight bills until an adjustment is made." In case shipments of these products were received by carriers from connecting lines, the custom and usage was for the terminal carrier to pay the charges of the connecting lines and to collect for the entire transportation from the consignees at destination after it had delivered the goods to them. These customs and usages prevailed in transactions between com-

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mon carriers and all reputable and responsible business houses, and the plaintiff was one of that character. The plaintiff had built up a commission business, a large part of which can be conducted only by the use of the defendant's railroad, and the charges for transportation which it paid to the defendant amounted to several thousand dollars a month. On December 15, 1906, the defendant notified its agents and connections that it would not thereafter accept freight consigned to the defendant, either from shippers or from connecting lines, unless the transportation charges thereon were prepaid, and it has since refused to accept such freight without prepayment. At the same time it has continued to receive for and to deliver freight to the competitors of the plaintiff who are similarly situated without the prepayment of transportation charges. This course of action was adopted by the defendant to harass the plaintiff, to injure its business and its credit, to give its competitors an unequal and unreasonable preference and advantage, and to subject it to an unequal and unreasonable prejudice in the transaction of its business, and it has that effect. It has impaired the plaintiff's credit and its financial responsibility and caused it considerable loss of business, and for these damages it demands a judgment of \$50,000.

Walter Holsinger, for plaintiff in error.

L. L. Brown (*W. D. Abbott* and *S. H. Somsen*, on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge (after stating the facts as above). Section 3 of the act of February 4, 1887, commonly called the "Interstate Commerce Act," provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 24 Stat. 380, c. 104 (3 U. S. Comp. St. 1901, p. 3155).

Is it a violation of this section for a common carrier which customarily delivers to consignees a certain class of freight, holds the freight bills until after any question arising concerning the correctness of any transportation charges upon its line and upon connecting lines over which the freight has been transported has been adjusted, and then collects them, to refuse to grant such a credit to a particular consignee and to require prepayment of freight bills by it while it still continues to extend credit to others

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similarly situated? In other words, is it a violation of this section for a railroad company to refuse to loan to one consignee without interest the moneys owing to it for transportation charges earned by it and for those paid by it to connecting lines until the consignee's claims that such charges are incorrect have been settled, when it customarily makes such loans to other consignees? This is the question which this case presents, and it is well to perceive clearly the nature of the controversy inherent in it and the amount actually involved before entering upon the discussion of the issue it presents.

The plaintiff is a commission company dealing in perishable products, such as fruit, vegetables, farm and dairy products, claims for errors in the transportation charges upon which and for damages from the transportation of which frequently arise and are met with great difficulty after the products have been delivered. The plaintiff alleges that it is the custom of the terminal carriers to advance the transportation charges upon such products to connecting lines, to deliver the products to the consignees, "and afterwards to collect the reasonable and proper charges for transportation, and, in case of any question arising as to correctness of any transportation charge upon the line of the terminal or any connecting carrier, such terminal carrier takes the matter up for adjustment and holds the freight bills until an adjustment is made," and that the defendant has refused to follow this custom and has demanded of it prepayment of the transportation charges on the freight consigned to it, and has refused to accept the freight without such prepayment, although it follows the custom in the treatment of its competitors similarly situated. It further alleges that the sum paid by it to the defendant for its transportation charges and those of connecting lines has amounted to several thousand dollars per month. A liberal interpretation of several thousand in this pleading is three thousand, and the complaint fails to show that the actual amount involved here is more than the interest on \$3,000, for by the deposit with the railroad company at the commencement of each month of \$3,000 to prepay its charges for freight during that month all of its alleged \$50,000 damages would have been avoided. In the light of these facts, we turn to the question of law to be determined.

There is a statute of the state of Minnesota which declares that it is unlawful for any common carrier to make or give any unequal or unreasonable preference to any person or corporation, or to subject any person or corporation to any unequal or unreasonable prejudice (Rev. Laws Minn. 1905, § 2009), and counsel argues that his complaint states a cause of action under this statute. There is, however, no averment in it of any diversity of citizenship of the parties or of any other ground of jurisdiction of a national court over a cause of action for the violation of this

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state statute, and for that reason the question whether or not the facts alleged disclose a disregard of that law was not judicable in the court below and is not so here, and it is dismissed without further consideration. *Little Rock & Memphis R. Co. v. St. Louis S. W. Ry. Co.*, 11 C. C. A. 417, 419, 63 Fed. 775, 777, 26 L. R. A. 192.

Prior to the enactment of the act of February 24, 1887, to regulate commerce among the states, interstate railway traffic was regulated by the principles of the common law, and under those principles common carriers had the right to require the prepayment of charges for freight of one or more persons or corporations, and to give credit for such charges to other persons or corporations similarly situated. *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 275, 12 Sup. Ct. 844, 36 L. Ed. 699; *Southern Indiana Express Co. v. United States Express Co. (C. C.)* 88 Fed. 659, 662; *Randall v. Railway Company*, 108 N. C. 612, 13 S. E. 137.

That act left common carriers free to exercise to their full extent all the rights and privileges they had under the common law, so far as these rights and privileges and their exercise were not rendered unlawful by the provisions of that act. That act did not make all preferences, advantages, prejudices, or disadvantages unlawful, but those only which are "undue and unreasonable." *Atchison, Topeka & Santa Fé R. R. Co. v. Denver & New Orleans R. R. Co.*, 110 U. S. 667, 673, 680, 682, 4 Sup. Ct. 185, 28 L. Ed. 291, in which the Supreme Court held that under the Constitution of Colorado, which prohibited any undue or unreasonable discrimination in charges or facilities, the refusal of the Santa Fé Railroad Company to stop its passenger trains at a junction of the railroad of the New Orleans Company with its railroad, to carry passengers and freight from that point at the same rate which it would receive if the passengers or freight were carried from the junction of the Santa Fé Company and the Denver & Rio Grande Railway Company in the same town, and to grant to the New Orleans Company through billing, through routing, through ticketing, and through checking of baggage, when it granted all these things to the Denver & Rio Grande Railway Company, a competitor of the New Orleans Company, was no violation of this Constitution, because the preferences, advantages, prejudices, and disadvantages thus created, though clearly discriminatory, were not undue or unreasonable. Although the opinion in this case was not a construction of the interstate commerce act, it interpreted a provision in the Constitution of Colorado identical in effect with the paragraph in the third section of that act under consideration, and furnished the standard for its construction, as Judge Jackson declared in *Kentucky & I. Bridge Co. v. Louisville & N. R. Co. (C. C.)* 37 Fed. 567, 629, 2 L. R. A. 289.

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Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 145 U. S. 263, 276, 12 Sup. Ct. 844, 848 (36 L. Ed. 699), where the Supreme Court held that the charge of a less rate for the transportation of 10 or more persons on a party rate ticket than was charged a single individual, although it created clear inequality and discrimination, did not give to the former an undue or unreasonable preference or subject the latter to an undue or unreasonable disadvantage within the meaning of the third section of the act under consideration, and said, "It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable"—page 276 of 145 U. S., page 848 of 12 Sup. Ct. (36 L. Ed. 699), affirming *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.* (C. C.) 43 Fed. 37, 46, 47. *Interstate Commerce Commission v. Detroit, Grand Haven & Milwaukee Ry. Co.*, 167 U. S. 633, 644, 17 Sup. Ct. 986, 42 L. Ed. 306.

Oregon Short Line & U. N. Ry. Co. v. Northern Pacific R. Co. (C. C.) 51 Fed. 465, 466, 467, 472, 473; *Oregon Short Line & U. N. Ry. Co. v. Northern Pacific R. Co.*, 9 C. C. A. 409, 410, 412, 413, 61 Fed. 158, 159, 161, 162. In this case the Northern Pacific Company, which owned a railroad from Portland, Or., to Seattle, Wash., and St. Paul, Minn., refused to receive and transport freight originating east of the 97th meridian and destined to points on its own line and on its connecting lines north of Portland tendered to it by the Short Line Company when such freight was in cars other than its own, unless the Short Line Company would pay to the owner of the cars the usual car mileage for their use, or would transfer such freight from the foreign cars into those of the Northern Pacific Company at Portland, and it also refused to transport such freight unless its charges from Portland to destination were paid, and refused to pay upon receiving the freight the charges due to the Short Line Company and its connecting lines for transporting this freight to Portland, while at the same time it received and transported freight originating west of the 97th meridian without any of these conditions, and paid the charges for its transportation to Portland, and it also received and transported freight originating both east and west of said meridian for the Southern Pacific Company without making any of these exactions. The Northern Pacific Company also refused to transport passengers destined to Puget Sound and other points on its lines upon through tickets from points east of the 105th meridian issued by the Short Line Company, although it received and transported passengers on through tickets issued by that company from points west of that line and on through tickets issued by the Southern Pacific Company from all points. Mr. Justice Field, in the Circuit Court and the Circuit Court of Appeals, decided that, while these acts constituted clear discriminations, they created no undue and unreasonable

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preferences, advantages, prejudices, or disadvantages, and hence that they were not violative of the interstate commerce act.

Little Rock & Memphis R. Co. v. St. Louis, Iron Mountain & Southern Ry. Co., Same *v. St. Louis S. W. Ry. Co.*, Same *v. Little Rock & Ft. Smith Railway Co.*, 59 Fed. 400, 406; *Id.*, 11 C. C. A. 417, 63 Fed. 775, 26 L. R. A. 192. In these cases the complainant was the Little Rock & Memphis Railroad Company. The St. Louis, Iron Mountain & Southern Railway Company refused to receive any freight from the complainant at Little Rock without a prepayment of charges, not because it was unwilling to extend credit, but from a desire to oppress that company, while it received freight at that point from all other persons and corporations without the prepayment of charges. The St. Louis Southwestern Company and the Little Rock & Ft. Smith Railway Company refused to honor through tickets or through bills of lading issued by the complainant, or to enter into any arrangement for through billing or through rating, while they honored such bills and tickets and made such arrangement with other railroad companies similarly situated. They also refused to accept and transport loaded cars coming from the complainant's railroad, and required the freight to be rebilled and reloaded into their own cars at points of junction, while they accepted and transported loaded cars coming under similar circumstances from the roads of other companies without any rebilling or reloading. Although these acts clearly gave preferences and advantages to the other companies similarly situated, and subjected the complainant to prejudices and disadvantages, the Circuit Court and this court, after exhaustive argument and upon careful consideration, held that these were neither undue nor unreasonable, and that they constituted no violation of the interstate commerce law. No contrary decision of the Supreme Court, or of any of the Circuit Courts of Appeals, of any of the questions decided by the cases which have just been reviewed, has come to our attention, but the decisions in those cases have been repeatedly followed. *Prescott & A. C. R. Co. v. Atchison, Topeka & Santa Fé R. Co.* (C. C.) 73 Fed. 438, 439; *Central Stockyards Co. v. Louisville & Nashville Ry. Co.*, 192 U. S. 568, 570, 571, 24 Sup. Ct. 339, 48 L. Ed. 565; *Louisville & Nashville R. R. Co. v. West Coast Naval Stores Co.*, 198 U. S. 483, 497, 498, 25 Sup. Ct. 745, 49 L. Ed. 1135.

General statements that there must be no difference in charges not based on difference in service, that rates must be equal to all under like conditions, and that unjust and unreasonable discrimination is forbidden may be found in the opinions of the courts and of the Interstate Commerce Commission in cases in which they were discussing radical differences in the direct charges for transportation under like conditions (*Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, 100, 21 Sup.

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Ct. 561, 45 L. Ed. 765; Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; United States v. Vacuum Oil Co. [D. C.] 153 Fed. 598, 606, 607; Hays v. Pennsylvania Co. [C. C.] 12 Fed. 309; Tift v. Southern Railway Co. [C. C.] 123 Fed. 789, 791; Scofield *et al.* v. Lake Shore & Michigan Southern Ry. Co., 2 Interst. Com. R. 67; Daniels v. Chicago, Rock Island & Pacific Ry. Co., 6 Interst. Com. R. 458; Page v. Delaware, Lackawanna & W. R. R. Co., 6 Interst. Com. R. 548; St. Louis Hay & Grain Co. v. Mobile & Ohio R. R. Co., 11 Interst. Com. R. 90, 101), and in cases in which the carriers absolutely refused to carry the property tendered on any terms, as in Crescent Liquor Company v. Platt (C. C.) 148 Fed. 894, 903; or to furnish cars at proper times and places where the rates were the same, as in Castle v. Baltimore & Ohio R. R. Co., 8 Interst. Com. R. 333, 344. Opinions of state courts may also be cited under statutes which depart from the language and the true interpretation of the interstate commerce act, and require certain carriers to grant "equal terms, facilities, accommodations and usages," and forbid them from "granting any terms, credit, privileges, advantages, usages or facilities" to one that are not granted to all (Burns' Ann. St. Indiana 1901, § 3312b), which hold that every person or corporation is lawfully entitled to every privilege and courtesy extended to any other similarly situated, so that under these statutes and decisions no carrier may waive any right or extend any courtesy to any person or corporation without becoming legally bound to do likewise to every other person or corporation under similar conditions, and under this statute of Indiana there is even a decision that if a corporation customarily waives its right to prepayment of freight, pays charges of connecting carriers, and grants credit, it is required by that statute to do so for all. Adams Express Company v. State, 161 Ind. 328, 67 N. E. 1033, 1039.

But such are not the terms and such is not the meaning or the effect of the interstate commerce act. The true interpretation of that act is illustrated by the decisions which have been reviewed. It was expressed by Judge Jackson, afterwards Mr. Justice Jackson of the Supreme Court, in *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.* (C. C.) 43 Fed. 37, in these words, which have been subsequently three times affirmed and adopted by the Supreme Court of the United States as the true interpretation of this law:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their

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business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits." *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 493, 17 Sup. Ct. 896, 42 L. Ed. 243; *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 196, 197, 16 Sup. Ct. 700, 40 L. Ed. 935; *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699; *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 173, 18 Sup. Ct. 45, 42 L. Ed. 414.

The question, therefore, is, did the defendant subject the plaintiff to any undue or unreasonable prejudice or disadvantage by requiring it to prepay the charges on its freight while the carrier customarily transported freight for others similarly situated without such prepayment? The defendant had the right under the common law to demand prepayment of its charges of the plaintiff and to grant credit to others for similar charges. It had the same right in this regard that every merchant, every man, and every corporation has to grant credit to one or to all but one, and to refuse it to others or to him. There was nothing unjust or morally wrong in the exercise of this right, because the plaintiff had no moral right to the extension of credit, and justice did not require that the defendant should grant to the plaintiff the same credit that it extended to others.

The interstate commerce act did not expressly deprive the defendant of this right or make its exercise unlawful; so far as its express provisions are concerned, it left the right and its exercise among those which the Supreme Court declared that carriers were free to exercise and to manage upon "the same principles which are regarded as sound, and adopted in other trades and pursuits."

The refusal to extend credit to a purchaser of goods, or of transportation, of financial responsibility, credit, and reputation equal to those of others to whom such credit is extended does not in the nature of things subject him to an undue or unreasonable prejudice or disadvantage, while a requirement that such a vendor shall extend equal credit to all purchasers of equal financial responsibility, credit, and reputation, would subject him to unreasonable and undue disadvantage. Reason, sound business principles, and the practice of the business world give the option to extend credit to the seller of his property, or his services, and to the loaner of his money, and not to the purchaser or borrower. There are other considerations besides financial responsibility, credit, and reputation, which condition the rational extension of credit, such as the experience of the seller or the loaner, the habits of the purchaser or the borrower, his fairness and promptness.

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The plaintiff avers that the defendant customarily gives credit to all other responsible and reputable business houses, and that it is a house of that character. Fruit, vegetables, farm and dairy products are perishable in their nature, of a character which renders them susceptible to claims for errors in charges for transportation and for damages during transportation. The usage and custom alleged is that the defendant, the terminal carrier, advances to connecting lines their charges upon these products, delivers them to the consignees, holds the bills for the charges for freight until claims arising from alleged errors therein are adjusted, and then collects them of the consignees. It is not inconceivable that a consignee might present under this usage such claims for errors in charges and for damages in transportation, and might so delay their adjustment and the payment of the charges for freight, that it would thereby secure a much greater advantage and preference over other consignees than the prejudice or disadvantage it would suffer by prepaying its charges for freight.

It is said, however, that the fact that a custom and usage exists not to require the prepayment of such charges renders the requirement of prepayment by the plaintiff, while others are given credit under like circumstances, the imposition of an undue and unreasonable disadvantage and prejudice upon it. But since the requirement of the prepayment of the charges for freight by the plaintiff while others similarly situated are granted credit for these charges subjects the plaintiff to exactly the same degree of prejudice and disadvantage in the absence of such a custom and usage as it does in its presence, the existence of the custom or usage cannot make that prejudice or disadvantage undue or unreasonable if it would not be so if the custom or usage did not exist. *Oregon Short Line & U. N. Ry. Co. v. Northern Pacific R. R. Co.* (C. C.) 51 Fed. 465, 472; *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 30 C. C. A. 142, 155, 86 Fed. 407, 420; *Little Rock & Memphis R. Co. v. St. Louis S. W. Ry. Co.*, 63 Fed. 775, 11 C. C. A. 417, 26 L. R. A. 192.

An attempt has been made in argument to distinguish these and other cases in which the requirement of prepayment of charges for transportation by one while no such requirement was made of others has been held to create no undue preference or disadvantage from the case in hand, upon the ground that those were actions by railroad companies while this is an action by a shipper, or by a consignee of a shipper; but an undue or unreasonable prejudice or disadvantage inflicted upon a railroad company falls under the ban of the law as completely as an undue prejudice or disadvantage imposed upon a shipper or a consignee, and it is more deleterious by as much as all the shippers or consignees over the lines of that carrier affected by it are more numerous than a single shipper or consignee, and by as much as the

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charges for the transportation of their freight are greater than his. Injury to a class by a violation of the interstate commerce act is far more damaging than to a single member of a class. *Crescent Liquor Co. v. Platt* (C. C.), 148 Fed. 894, 901.

One of the averments of the plaintiff in his complaint is that the defendant required the plaintiff to prepay its freight, and gave notice to that effect, for the express purpose of harassing and annoying the plaintiff and injuring its business. But the sole question in this case is whether or not the requirement of the prepayment of the charges for freight constituted a violation of the interstate commerce act. If it did, a noble purpose or a good motive constitutes no defense to the cause of action founded upon it. If it did not, a bad motive or an evil purpose creates no cause of action founded upon the exercise of a legal right. "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." *Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233; *Cooley on Torts*, pp. 1503, 1505.

Finally, the question at issue in this case in the presence of a custom and usage not to demand prepayment of transportation charges, in the presence of a motive and purpose by the defendant to harass and oppress the plaintiff by the demand of such prepayment, and in the presence of the subjection of the plaintiff in that case to very much more aggravated prejudice and disadvantage than those alleged in the action under consideration, was presented, decided, and the considered opinion of this court upon it was delivered by Judge Thayer in 1894 in these words:

"It will be observed that the sole question in the cases filed against the St. Louis, Iron Mountain & Southern Railway Company concerns the right of that company to require the prepayment of freight charges on all property tendered to it for transportation at Little Rock by the Little Rock & Memphis Railroad Company, while it pursues a different practice with respect to freight received from other shippers at that station. At common law a railroad corporation has an undoubted right to require the prepayment of freight charges by all its customers, or some of them, as it may think best. It has the same right as any other individual or corporation to exact payment for a service before it is rendered, or to extend credit. *Oregon Short Line & U. S. Ry. Co. v. Northern Pacific R. Co.* (C. C.), 51 Fed. 465, 472. Usually, no doubt, railroad companies find it to their interest, and most convenient, to collect charges from the consignee; but we cannot doubt their right to demand a reasonable compensation in advance for a proposed service, if they see fit to demand it. This common-law right of requiring payment in advance of some customers, and of extending credit to others, has not been taken away by the interstate commerce law, unless it is taken away indirectly by the inhibition contained in the third section

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of the act, which declares that an interstate carrier shall not 'subject any particular person, company, corporation or locality * * * to any undue or unreasonable * * * disadvantage in any respect whatever.' This prohibition is very broad, it is true, but it is materially qualified and restricted by the words 'undue or unreasonable.' One person or corporation may be lawfully subjected to some disadvantage in comparison with others, provided it is not an undue or unreasonable disadvantage. In view of the fact that all persons and corporations are entitled at common law to determine for themselves, and on considerations that are satisfactory to themselves, for, whom they will render services on credit, we are not prepared to hold that an interstate carrier subjects another carrier to an unreasonable or undue disadvantage because it exacts of that carrier the prepayment of freight on all property received from it at a given station, while it does not require charges to be paid in advance on freight received from other individuals and corporations at such station. So far as we are aware, no complaint had been made of abuses of this character at the time the interstate commerce law was enacted, and it may be inferred that the particular wrong complained of was not within the special contemplation of Congress. This being so, the general words of the statute ought not to be given a scope which will deprive the defendant company of an undoubted common-law right, which all other individuals and corporations are still privileged to exercise, and ordinarily do exercise." *Little Rock & Memphis R. Co. v. St. Louis S. W. R. Co.*, 63 Fed. 777, 11 C. C. A. 419 (26 L. R. A. 192).

The question was decided in the same way by Mr. Justice Field in the Circuit Court in *Oregon Short Line & U. N. Ry. Co. v. Northern Pacific R. R. Co.*, 51 Fed. 465, 473, 474, affirmed by the Circuit Court of Appeals of the Ninth Circuit in 9 C. C. A. 409, 410, 412, 413, 414, 61 Fed. 158, 159, 161, 162, and by the Circuit Court of Appeals of the Fifth Circuit in *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 30 C. C. A. 142, 154, 155, 86 Fed. 407, 419, 420. It is more than 14 years since this court rendered that decision, no contrary opinion of any national court upon this question has been called to our attention, and because the right of a common carrier to require prepayment of charges for transportation from one and to give credit for them to another similarly situated existed under the common law, because neither this right nor its exercise were made unlawful by the terms of the interstate commerce act, because the exercise of that right is not in itself unreasonably prejudicial, or disadvantageous, because the former decision of this court rules this case and ought not to be overruled unless it is clearly wrong, and because upon a careful reconsideration of that decision in the light of the subsequent decisions of the courts we are still convinced

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that it was right, our conclusion in this case is that the requirement by the plaintiff of the prepayment of charges by the defendant for the transportation of its freight, while no such requirement was made of others similarly situated, while there existed a custom or usage for the carrier to advance the charges of connecting carriers, to deliver the freight to the consignees, to hold bills for freight until claims arising out of errors in transportation charges were adjusted, and then to collect them, did not subject the plaintiff to undue or unreasonable prejudice or disadvantage or give to others similarly situated any undue or unreasonable preference or advantage within the meaning of section 3 of the interstate commerce law, and the judgment below must be affirmed.

It is so ordered.

STATE *ex rel.* RAILROAD COM'RS *v.* LOUISVILLE & N. R. Co.

(Supreme Court of Florida, March 23, 1909.)

[49 So. Rep. 39.]

Carriers—Powers of Railroad Commissioners.*—The Railroad Commissioners are statutory officers, whose powers are special and limited. They can exercise only such authority as is legally conferred by express provisions of law, or such as is by fair implication and intendment incident to and included in the authority expressly conferred, for the purpose of carrying out and accomplishing the purposes for which the offices were established. Any reasonable doubt of the existence in said Commissioners of any particular power should be resolved against their exercise of such power.

Carriers—Power of Railroad Commissioners—Report of Wrecks.—There is no authority of law for the adoption or enforcement by the Florida Railroad Commission of a rule requiring railroads to report to such Commission by telegram, followed by a written report, of all wrecks and their causes, and of the names and addresses of the persons killed or injured in such wrecks.

(Syllabus by the Court.)

In Banc. Application by the State, on the relation of the Railroad Commissioners, for writ of mandamus against the Louisville & Nashville Railroad Company. Writ quashed.

L. C. Massey, for relators.

Blount & Blount & Carter, for respondent.

*For the authorities in this series on the subject of the powers of railroad commissions, see *Railroad Comr's v. Atlantic Coast Line R. Co.* (S. Car.), 17 R. R. R. 505, 40 Am. & Eng. R. Cas., N. S., 505; *Augusta Brokerage Co. v. Central of Georgia Ry. Co.* (Ga.), 15 R. R. R. 4, 38 Am. & Eng. R. Cas., N. S., 4.

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TAYLOR, P. J. This case is one of original jurisdiction in this court.

On January 28, 1908, the Railroad Commissioners of this state adopted and prescribed the following as rule No. 12 of its general rules:

"12. Every railroad company shall report to the Railroad Commissioners immediately by telegram any wreck, either of passenger or of freight train, that may occur on its line in this state, giving as nearly as possible the cause of the wreck, the extent of the damage to the equipment and the track, and the number of persons killed or wounded; and such telegram shall be followed with a full written statement, made within five days thereafter, giving full details of the above matters, and the names and addresses of the persons killed or wounded, whether employees or others. This rule shall not apply to simple derailments of freight cars or yard engines, when switching or shifting in yards, except when some person is killed or injured, in which case, a report shall be made as in other cases."

For an alleged refusal of the respondent railroad company to comply with this rule the State Railroad Commissioners by this proceeding in mandamus are seeking to enforce compliance therewith.

The respondent moves to quash the alternative writ, among others, on the two following grounds:

(1) Because rule 12 of the Florida Railroad Commission, set forth therein and sought to be enforced thereby, is invalid, because the relators were without power to adopt it.

(2) The power to adopt it is a legislative power, which cannot lawfully be delegated to relators.

To maintain the authority of the Commission to prescribe this rule we are cited to the case of *Stone v. Yazoo & M. V. R. Co.*, 62 Miss. 607, 52 Am. Rep. 193. Upon investigation we find that such a rule was there upheld because the Railroad Commission was there duly authorized to adopt it by an express provision of the Mississippi statute.

In the case of *State v. Atlantic Coast Line R. Co. (Fla.)*, 47 South. 969, it is said that: "The Railroad Commissioners are statutory officers, whose powers are special and limited. They can exercise only such authority as is legally conferred by express provisions of law, or such as is by fair implication and intent incident to and included in the authority expressly conferred for the purpose of carrying out and accomplishing the purposes for which the offices were established." It was further said in substance in that case that any reasonable doubt of the existence in said Commissioners of any particular power should be resolved against their exercise of such power.

We have carefully examined all of our statutes appertaining

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to the Railroad Commission, and we fail to discover in them anywhere any express power to prescribe such a rule; nor do we find any power delegated to them which by any fair or reasonable implication or intendment could be reasonably held to include as an incident the power to adopt or prescribe such a rule.

Our conclusion being that our Railroad Commission have no authority to prescribe the rule in question, it follows that the motion of the respondent to quash the alternative writ of mandamus must be, and is hereby, granted, and the cause dismissed, at the cost of the state. All concur, except PARKHILL, J., absent on account of illness.

CHICAGO, R. I. & P. RY. CO. v. ALBERT PFEIFER & BRO.

(Supreme Court of Arkansas, May 24, 1909.)

[119 S. W. Rep. 642.]

Carriers—Loss of Freight—Delivery to Carrier—Evidence.—Evidence, in an action against a carrier for nondelivery of freight, that there was shipped to plaintiff at the same time, and as parts of the same shipment, a barrel and a box, that defendant received from a connecting carrier the barrel and transported it to destination, that on its waybill and expense bill appeared both the barrel and box with notations indicating that both were received by it and carried to destination and checked as in its possession there, is sufficient evidence that it received the box, though 30 days after delivery of the barrel to plaintiff, at which time defendant could not find the box, it was found in the possession of another carrier at its destination.

Carriers—Duty to Deliver Freight.*—The duty of a carrier to deliver freight to the proper party is absolute.

Carriers—Delay in Delivering Freight—Rights of Owner.†—The owner of freight may not, because of delay of the carrier in deliver-

*For the authorities in this series on the subject of the duty of the carrier to deliver freight to the person entitled to receive it, see last foot-note appended to *Atchison, etc., Ry. Co. v. Schriver* (Kan.), 21 R. R. R. 150, 44 Am. & Eng. R. Cas., N. S., 150.

†See *Corso v. New Orleans & N. E. R. Co.* (La.), 5 Am. & Eng. R. Cas., N. S., 43 (duty of consignee to receive freight which has been slightly damaged in transportation); *Ryland & Rankin v. Chesapeake & O. Ry.* (W. Va.), 13 R. R. R. 279, 36 Am. & Eng. R. Cas., N. S., 279 (delay does not constitute conversion of goods so as to make carrier liable for their value); *Illinois Cent. R. Co. v. Johnson & Fleming* (Tenn.), 20 R. R. R. 272, 43 Am. & Eng. R. Cas., N. S., 727 (consignee, by declining to receive a delayed shipment from the carrier, cannot convert the carrier into a tort-feasor and hold him liable for the value of the property); *Moody v. Southern Ry. Co.* (S. Car.), 28 R. R. R. 706, 51 Am. & Eng. R. Cas., N. S., 706 (plaintiff was bound to receive the freight when tendered by the carrier, notwithstanding the delay, the carrier's liability being to render compensa-

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ing it, refuse to receive it, and sue the carrier for the value of the goods, though he has been obliged to buy other like goods; but he should accept it and sue for the damages.

Carriers—Refusal of Owner to Accept Freight—Duty of Carrier.—Refusal of the owner to accept freight because of the delay of the carrier in delivery does not discharge the carrier from liability for the goods, but it should safely store them, and so be able to keep its tender good; and having, instead, disposed of, and so converted, them, it is liable for their value.

Appeal and Error—Harmless Error.—Any error in refusing or giving instruction, on issues as to which under the undisputed evidence the verdict is correct, is harmless.

Appeal from Circuit Court, Pulaski County; Robt. J. Lea, Judge.

Action by Albert Pfeifer & Bro. against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Thos. S. Buzbee and *G. A. McConnell*, for appellant.
J. H. Harrod, for appellee.

FRAUENTHAL, J. The plaintiffs, Albert Pfeifer & Bro., instituted this suit against the defendant, the Chicago, Rock Island & Pacific Railway Company, and in their complaint alleged: That on or about October 1, 1907, they purchased from Edward Miller & Co. two packages of electric fixtures for electroliers and delivered same to the New York, New Haven & Hartford Railroad at Meriden, Conn., to be carried over its own and connecting lines of railroad to Little Rock, Ark., and there to be delivered to plaintiffs; that the two packages of fixtures were delivered to and received by the defendant as the connecting carrier; that the defendant lost one of the packages and failed to deliver same to plaintiff; that this package contained a part of the electric fixtures and was of the value of \$67.43, for which sum they sought judgment against defendant. They recovered judgment against the defendant in the court of a justice of the peace, and the defendant took the cause by appeal to the circuit court, and in that court a trial was had before a jury, who returned a verdict for \$67.43 in favor of the plaintiff, and from the judgment entered on said verdict the defendant appeals to this court.

tion for damages growing out of the delay, and not for loss of the flour); *Chesapeake & O. Ry. Co. v. Saulsberry* (Ky.), 26 R. R. R. 727, 49 Am. & Eng. R. Cas., N. S., 727 (shipper not justified, because of unreasonable delay, to refuse to receive freight).

†See note, 2 Am. & Eng. R. Cas., N. S., 722; *Southern Ry. Co. v. Born Steel Range Co.* (Ga.), 25 R. R. R. 558, 48 Am. & Eng. R. Cas., N. S., 558 (duty of carrier to hold shipment when unable to find consignee).

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The defendant filed no written answer in this case, but it contends: That it did not receive the package of goods, for the value of which this suit is brought; that about a month after the shipment was made this package of goods was tendered to plaintiffs at Little Rock, Ark., and they refused to accept it; that for these reasons the defendant is not liable to plaintiffs; and, in event there is any liability on its part, such liability is for an amount only which would be the difference between the value of these goods at the time they should have been delivered and their value at the time they were tendered to plaintiffs at Little Rock, Ark. Before the plaintiffs can recover herein against the defendant, it is incumbent upon them to prove that these goods were delivered to and received by the defendant. That issue was presented to the jury by an instruction given upon the part of the defendant in which the court said: "You are instructed that if you find from the evidence that the goods in question were never delivered to the defendant at Memphis, by the connecting carrier, your verdict will be for the defendant."

The jury, by their verdict, found that the goods were delivered to the defendant, and it is contended that there is not sufficient evidence to sustain that finding. The evidence tended to prove that the entire shipment of electric fixtures were packed in two packages, one a barrel, and the other a box, and that these two packages were entered by the initial carrier upon one waybill and were also entered on one expense bill. They were shipped from Meriden, Conn., on the same day in October, 1907, and were transported to Memphis, Tenn., at which point the defendant is a carrier connecting with the lines of carriers from points in Connecticut, and the defendant is a carrier over its own lines of railroad from Memphis, Tenn., to Little Rock, Ark. On October 15, 1907, the defendant presented to the plaintiffs its expense bill for the freight for the carriage of these two packages of goods from Meriden, Conn., to Little Rock, Ark., and on this bill were the two packages, the barrel and the box, and the plaintiff paid to the defendant the charges for the transportation of the barrel of fixtures and the box of fixtures, and received from the defendant the receipted expense bill upon which were the two items. Thereupon, on that day, the defendant delivered to the plaintiffs the barrel of fixtures, but did not deliver the box of fixtures. An employee of the Merchants' Transfer Company, in conjunction with one of the clerks of defendant, made search for this box at the freight depot of defendant, but failed to find it. This employee had had an experience of several years in the handling and delivery of goods at and from the depot of defendant to its patrons in the city of Little Rock. He testified that he saw the waybill of defendant for these goods, and that the two packages appeared thereon, and that around both items were certain check marks or circles which, according to the conduct

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of the business at defendant's office, indicated that both the packages, barrel and box, had been received at Little Rock, Ark., by defendant.

Upon the part of the defendant, the evidence tended to show that, about 30 days after the defendant had delivered to plaintiffs the barrel of fixtures, another railroad company operating in Little Rock, Ark., the St. Louis, Iron Mountain & Southern Railroad Company, claimed to have at its freight room a box directed to plaintiffs and presumably the box of fixtures involved in this case, and offered same to plaintiffs, which they refused to accept; but there is no testimony indicating when or from whom this latter company received the box of goods. There is no testimony tending to show that this latter company received this box of goods at Memphis, Tenn., or from some carrier entering Memphis from the east and a connection of the initial carrier. So far as the testimony in this case appears, it may be that the St. Louis, Iron Mountain & Southern Railway Company received this box of goods from the defendant, through mistake or otherwise, at Memphis, Tenn., or at Little Rock, Ark., after its shipment over defendant's line of railroad. However that may be, the evidence is sufficient to justify the jury in finding that this box of fixtures, was actually delivered to and received by the defendant at Memphis, Tenn.; and the fact that 30 days later it was found in the possession of the other railroad company does not disprove this conclusion.

In the case of Union Pacific Railroad Co. v. Hepner, 3 Colo. App. 313, 33 Pac. 72, it was held that an expense bill presented by the carrier's agent at the point of destination, containing charges for freight on a certain lot of articles, embracing them all and sufficiently identifying them as the goods shipped by the plaintiff, indorsed correct by the company's agent, was sufficient to show a delivery to the company and to charge it with the loss of such articles which it failed to deliver. In the case at bar the two packages, barrel and box, were transported at the same time in one shipment. The defendant admits it received and transported the barrel of goods. Upon its waybill and expense bill appeared both the barrel and box of goods with notations thereon indicating that both barrel and box were received by it and carried by it to Little Rock and checked as in their possession at Little Rock. The question as to whether the defendant did receive the box of goods was a question of fact peculiarly within the province of the jury to determine. They have found that the defendant did receive same, and we cannot say that there is not sufficient evidence to sustain that finding. Having thus received this box of fixtures for carriage, the defendant became responsible not only for their safe carriage against all accidents except the act of God or the public enemy, but also became responsible for their delivery to the proper person. The duty im-

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posed by law upon the carrier to deliver the goods to the proper party is absolute, and nothing will excuse a delivery to any other party; and if a misdelivery of the goods is made by the carrier growing out of mistake, or fraud, or imposition on it, this will not relieve the carrier from liability. 2 Hutchinson on Carriers (3d Ed.) § 662; 6 Cyc. 472; Little Rock, M. R. & Tex. Ry. Co. v. Glidewell, 39 Ark. 487. So that, after defendant received the goods, the fact that they were turned over to another railroad company, either through mistake or otherwise, would not relieve the defendant from making a delivery or an offer of a delivery of the goods to plaintiffs, either by the defendant company or the other company acting for it.

The evidence on the part of the defendant tended to prove that, about 30 days after the receipt by plaintiff of the barrel of goods, the plaintiffs were notified that the box of goods was in the possession of the St. Louis, Iron Mountain & Southern Railway Company, and the box of goods was then offered to plaintiff, and they refused to accept same. They claim that the delay in shipment of the goods had been so long that they purchased other goods of a like character, and so notified defendant before the box of goods was offered to them for delivery, and on this account they then refused to accept them; but the plaintiffs were not justified in refusing to accept the goods on account of the delay. As is said in 3 Hutchinson on Carriers (3d Ed.) § 1372: "Delay on the part of the carrier does not constitute a conversion of the goods, no matter how long continued, so as to make him liable for their value." The failure to deliver the goods within a reasonable time by the carrier is only a breach of the contract of carriage, and the carrier is liable for the damages incurred by reason of the delay; "but the owner cannot refuse to accept the goods on account of the unreasonable delay in the carriage and sue for a conversion." St. L., I. M. & S. R. Co. v. Mumford, 44 Ark. 439. In the case of Baumbach v. Gulf, Col. & Santa Fe Ry. Co., 4 Tex. Civ. App. 650, 23 S. W. 693, the plaintiff had a car load of lumber on one of defendant's cars which by agreement was to be delivered at a point about one mile distant, where plaintiff was building a house. The lumber was not delivered until about 1½ months later, and the plaintiff, having in the meanwhile purchased other lumber, refused to receive same, and sued for the value of the lumber. In that case it was held that the plaintiff should have accepted the lumber and held the defendant liable for all actual damages which he had sustained. 5 Am. & Eng. Ency. Law, 224; 6 Cyc. 449. But the refusal of plaintiffs to accept the goods did not discharge the company from all liability for the goods. The company still owed a duty to plaintiffs for the care of the goods. It should have stored the goods in its depot, or in some warehouse where they would be reasonably safe and free from injury. It had no right to aban-

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don the goods or to convert them to its own use. In the case of *Bacharach v. Chester Freight Line*, 133 Pa. 414, 19 Atl. 409, it was held that, although the consignee refused to accept the goods, yet upon a renewed demand by the consignee, if the carrier failed or refused to deliver the goods, the consignee could sue for the conversion of the goods. *Little Rock & Miss. River & T. Ry. Co. v. Gildewell*, 39 Ark. 487 (490); 6 Cyc. 474; 2 *Hutchinson on Carriers* (3d Ed.) § 685.

Even if there had been charges unpaid by plaintiffs on the goods, the defendant could not dispose of same without some statutory authority or under a judicial order or legal process; and an unauthorized disposition of the goods by defendant would amount to a conversion. 2 *Hutchinson on Carriers* (3d Ed.) § 889. But in this case the undisputed evidence showed that the plaintiffs had paid to defendant all freight charges, and that therefore there were no charges due thereon so far as the plaintiffs were concerned.

In this case the evidence on the part of the defendant itself shows that, after the plaintiffs refused to take the goods, the St. Louis, Iron Mountain & Southern Railroad Company disposed of them. Now this latter company in tendering the goods to the plaintiffs was only acting for and on behalf of the defendant. If it was not, the plaintiffs were in no relation with them in the matter of these goods, and were under no duty to accept the goods from them or to treat with them. The defendant had received the goods, and, if by mistake or otherwise it delivered them to the St. Louis, Iron Mountain & Southern Railroad Company, it did not deliver them to the proper person, and so became liable for the value of the goods. If, acting for or in behalf of or as agent of the defendant, the St. Louis, Iron Mountain & Southern Railroad Company tendered these goods to plaintiffs, the tender should, like all tenders, have been kept good to the time of the trial, and the box of electric fixtures should have been offered to plaintiffs at the trial. *Hamlett v. Tallman*, 30 Ark. 505; *Schearff v. Dodge*, 33 Ark. 340; *Cole v. Moore*, 34 Ark. 589; *Bloom v. McGehee*, 38 Ark. 329; *Kelly v. Keith*, 85 Ark. 30, 106 S. W. 1173. The disposal of these goods by the defendant or its agent was a conversion of them by it, and on account of that conversion the defendant is liable to plaintiffs for the value of these goods.

The principles of law herein announced will sufficiently indicate the respective rights and duties of the parties growing out of the delay in the carriage of these goods, and in the offer thereafter to deliver them and the refusal by plaintiffs to receive same. We do not think it necessary to review the instructions that were given or refused relative to this issue. Because whether or not it was incorrect to give or to refuse any such instructions relative to this latter issue and the measure of damages, it was not preju-

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dical, for the reason that, upon the undisputed evidence, the verdict of the jury upon this issue and the measure of damages was correct. Under proper instructions the jury found that defendant received these goods for carriage, and the undisputed evidence shows that thereafter these goods were never actually delivered by it or by any one for it to the plaintiffs, the proper parties to receive same; but the undisputed evidence does show that the goods were disposed of by the defendant or by one holding them for or in behalf of defendant, and that thereby the goods became totally lost to plaintiffs. In this way the defendant became liable by way of conversion for the value of these goods. Regardless therefore as to whether or not any of the instructions relative to the delay in the carriage of the goods, the alleged tender thereof thereafter to plaintiffs, and their refusal to accept them at that time, and the measure of damages, were erroneous, the finding and judgment in favor of plaintiff on the whole case is clearly right. In such case, even though some of the instructions were not correct, the judgment should not be reversed. *St. Louis Southwestern Ry. Co. v. Russell*, 64 Ark. 237, 41 S. W. 807; *Hershy v. Latham*, 46 Ark. 542; *Burton v. Baird*, 44 Ark. 556; *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233.

The judgment is affirmed.

ST. LOUIS & S. F. R. CO. v. MAYER BROS. CO.

(Supreme Court of Kansas, March 6, 1909.)

[100 Pac. Rep. 623.]

Carriers—Delivery—Persons Entitled.*—Where the bill of lading provided that unless the word "order" was written thereon immediately before or after the name of the party to whose order the freight was consigned, the carrier might deliver without requiring the production or surrender of the bill of lading, and that word was not so written thereon, the company could deliver the property without a surrender of the bill of lading.

Error from District Court, Cowley County; C. L. SWARTS, Judge.

Action by the Mayer Bros. Company against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed, and judgment directed for defendant.

W. F. Evans and *R. R. Vermilion*, for plaintiff in error.
Love & Wright, for defendant in error.

*See foot-note of *Nashville, etc., Ry. Co. v. Grayson County Nat. Bank (Tex.)*, 24 R. R. R. 140, 47 Am. & Eng. R. Cas., N. S., 140.

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PER CURIAM. One proposition is decisive of this case. The bill of particulars alleged that the railroad company received a shipment of goods at St. Louis, Mo., as a common carrier, to be transported to Arkansas City, Kan., and that it wrongfully and negligently delivered the same "to a party other than the consignee, without said party having presented to it a bill of lading properly indorsed." This was denied. A single issue of fact was sharply presented, and plaintiff, to prove its case, introduced with other evidence the bill of lading. The demurrer to the evidence should have been sustained, for the reason that the bill of lading contained a printed condition, which provided that unless the word "order" was written thereon immediately before or after the name of the party to whose order the property was consigned, the carrier might deliver without requiring the production or surrender of the bill of lading. The word "order" was not so written thereon. It conclusively appeared from plaintiff's evidence that the action of the railroad company in delivering the property without a surrender of the bill of lading was not wrongful. The record nowhere discloses that the trial court's ruling was based on the illegibility of the printed conditions on the back of the bill of lading. That question does not seem to have been an issue. If it had been, the bill of lading, as shown by the record, appears to be legible; at least, there is no difficulty in reading the condition to which we have been referred.

The judgment will be reversed, with directions to enter judgment for defendant below.

McMEEKIN v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, April 15, 1909.)

[64 S. E. Rep. 413.]

Carriers—Bill of Lading—Receipt—Construction.—A bill of lading is in form nothing more than a receipt for freight, issued to the consignor by the carrier, containing the contract of shipment, so that, in an action against a carrier for failure to deliver part of the shipment, a paper, which had been recognized as valid by the carrier's agent at destination, all the goods which had arrived being turned over on its presentation, and which was of the same effect as a regular printed bill of lading, it, in addition to being a receipt, containing the specification, "as per conditions company's bill of lading," thus supplying the essential that a mere receipt might lack, was properly admitted against the carrier.

Evidence—Secondary Evidence—Failure of Other Party to Produce Original.—A paper, purporting to be notice to a carrier of special damages to plaintiff, though only a copy, being identified by the car-

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rier's agent, is admissible against it, on its failure to produce the original.

Carriers—Bill of Lading—Transfer of Title.*—The general rule is that the delivery, without indorsement, of a bill of lading, by the one entitled by its terms to the goods, will transfer his title.

Carriers—Bill of Lading—Transfer Without Indorsement—Waiver.—Even if delivery to plaintiff, without indorsement, of a bill of lading by the one entitled by its terms to the goods did not give plaintiff a right of action thereon against the carrier, it would be some evidence of waiver of the requirement that, without the indorsement, the carrier's agent recognized plaintiff's right to the goods, and that the carrier issued to him a voucher for the value of the lost part of the goods shipped.

Carriers—Delay in Delivery—Special Damages—Notice.†—That recovery of special damages may be had of a carrier for delay in delivery of goods shipped, the notice of special damages should be given before the shipment; so that, where such notice is not given till after discovery that certain of the goods have been lost, there can be no recovery of such damages, in the absence of evidence of negligence of the carrier in attempting to trace the lost freight.

Carriers—Delay in Delivery—Special Damages—Notice.†—Though notice of special damages from delay in delivery of freight is not sufficient as to such shipment, being given after the goods were lost, yet, the carrier's agent being thereby informed of the inconvenience because of the delay, this is sufficient notice to it of the need of haste as to a second shipment, made a few days later to supply the goods lost.

Carriers—Delay in Delivering Freight—Special Damages.‡—The special damage to business from delay of a carrier in delivering a shipment of machinery, to be used in construction of a mill, the business of which had not been launched, is not loss to the business of

*See foot-note of *Barnum Grain Co. v. Great Northern Ry. Co.* (Minn.), 25 R. R. R. 642, 48 Am. & Eng. R. Cas., N. S., 642; foot-note of *Hardie & Co. v. Vicksburg, etc., Ry. Co.* (La.), 26 R. R. R. 223, 49 Am. & Eng. R. Cas., N. S., 223.

†For the authorities in this series on the subject of the right to recover special damages from a carrier of freight as affected by the carrier's knowledge or lack of knowledge of the urgency of the shipment, or other special circumstances, and as to what constitutes notice to the carrier of such circumstances, see first foot-note of *Matheson v. Southern Ry. Co.* (S. Car.), 28 R. R. R. 130, 51 Am. & Eng. R. Cas., N. S., 130, where all those preceding it are collected; foot-note of *Pilcher v. Central of Georgia Ry. Co.* (Ala.), 30 R. R. R. 355, 53 Am. & Eng. R. Cas., N. S., 355; foot-note of *James v. American Express Co.* (N. J.), 30 R. R. R. 163, 53 Am. & Eng. R. Cas., N. S., 163.

‡For the authorities in this series on the subject of the measure and elements of the damages recoverable for delay in transporting or delivering freight, see foot-note of *Southern Ry. Co. v. Coleman* (Ala.), 27 R. R. R. 153, 50 Am. & Eng. R. Cas., N. S., 153, where all those preceding it are collected; foot-note of *Conheim v. Chicago C. W. Ry. Co.* (Minn.), 30 R. R. R. 165, 53 Am. & Eng. R. Cas., N. S., 165.

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running a mill, but to the business of constructing a mill, which is the interest on the money invested in the work of construction, and the wages of laborers employed for construction, reduced by the earnings received, or which by reasonable diligence could have been received, from their employment, during the delay, in other work.

Carriers—Delay in Delivering Freight—Special Damages—Evidence.—Evidence, in an action against a carrier for delay in delivery of machinery to be used in a mill in process of construction, held insufficient to show damages to the amount of the recovery to the business of building the mill.

Appeal from Common Pleas Circuit Court of Fairfield County.

Action by H. A. McMeekin against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded for new trial.

J. E. McDonald, for appellant.

Ragsdale & Dixon, for respondent.

WOODS, J. The plaintiff, H. A. McMeekin, in the latter part of July, 1906, through W. R. Rabb & Co., in Winnisboro, S. C., ordered from a firm in Atlanta, Ga., a sawmill outfit. Upon arrival of the machinery at Rockton, S. C., Plaintiff's station, it was discovered that material parts, a husk frame and pulley, were missing. On 4th August plaintiff gave notice to Estes, defendant's agent at Rockton, of special damage accruing to his business because of the delay, and, after waiting about 10 days, ordered another husk frame and pulley. The missing portion of the first shipment never arrived, and the second consignment was not received until 6th September. Plaintiff brought this action for the value of the lost husk frame and pulley, and for special and punitive damages for the loss incurred. On defendant's motion the trial judge granted a nonsuit as to punitive damages. Defendant's counsel admitted liability for \$77, the value of the lost portions of the machinery first shipped, and the court submitted to the jury the issue of special damages. The jury brought in a verdict of \$617 for the plaintiff, and the defendant appealed.

The appeal is based upon the alleged errors of the circuit court in admission of testimony, in the charge to the jury, and in the refusal of motions for nonsuit, for direction of a verdict, and for a new trial. For convenience the numerous exceptions, as far as possible, will be considered together.

The exceptions taken to the admission in evidence of the alleged bill of lading and the written notice to defendant of plaintiff's special loss because of delay are without merit. The paper introduced as the bill of lading had been recognized as valid by the defendant's agent at Rockton, for upon its presentation he had turned over to the plaintiff such of the goods set out therein

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as had arrived. A bill of lading is in form nothing more than a receipt for freight, issued to the consignor by the carrier, containing the contract of shipment. The paper here introduced was of the same effect as a regular printed bill of lading; for, in addition to being a receipt, it contained this specification, "As per conditions company's bill of lading," which supplied the essential that a mere receipt might lack. *Dunbar v. So. Ry.*, 62 S. C. 414, 40 S. E. 884. The paper purporting to be the notice to defendant of special damages to plaintiff was only a copy; but it was identified by defendant's agent; and, upon the failure of the railway company to produce the original, it was admissible. *Beaty v. So. Ry. Co.*, 80 S. E. 527, 61 S. E. 1006.

The exception "that the alleged bill of lading was issued to Rabb & Co., and there was no indorsement thereon, which was necessary to give the plaintiff herein a right of action on said alleged bill of lading," was one taken to the refusal of the nonsuit. The general rule of law is that the delivery of the bill of lading by the person who, according to the terms of the bill, is entitled to the goods will transfer his title. 6 Cyc. 426. Appellant cites no authority or provision of the contract to show that actual indorsement is necessary to pass the title of the consignee in a bill of lading to a third party. But were this the rule, the fact that defendant's agent recognized the plaintiff's right to the goods under the bill of lading, in absence of indorsement to him, would be some evidence to go to the jury of waiver of such a requirement. Furthermore, the issuance of a voucher for \$77 to plaintiff, which was never cashed, and was in evidence, the value of the lost machinery, was evidence that the railway company recognized its liability to the plaintiff, McMeekin, for its breach of contract of shipment. The exception setting forth the absence of any contractual relation between the plaintiff and the carrier is also overruled.

The appellant contends that this is not a case where special damages could be allowed, and the numerous exceptions stating this contention will be considered together. Defendant earnestly urges that there was no notice of special damages given at the time of shipment, and hence it could not be held liable for such loss accruing to plaintiff because of delay. Plaintiff admitted that he claimed special damages only from the time when he notified the defendant's agent of such loss, subsequent to the shipment of the first order. The only evidence as to defendant's course after receiving this notification was the testimony of Estes, agent at Rockton, to the effect that he telegraphed and did what he could to trace the missing pieces. Therefore the plaintiff, in absence of evidence of negligence on the part of the carrier in attempting to trace and find the freight, could not recover special damages for delay in delivery, under a notice given subsequent to the time of shipment. *McKerall v. Ry. Co.*, 76 S.

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C. 338, 56 S. E. 965; *Matheson v. Ry. Co.*, 79 S. C. 155, 60 S. E. 437. As to the first shipment, therefore, there was no foundation laid in the evidence for the recovery of anything more than the \$77, the value of the lost portion of the machinery. But this is not true as to the second shipment, for the notice of damages accruing because of delay, being prior to the second shipment, certainly extended to that shipment; for the record discloses that the agent, Estes, was cognizant of plaintiff's anxiety and inconvenience because of delay, and the short lapse of time was evident that, by the exercise of reasonable diligence, he could have kept the notice in mind. *Mills v. Ry. (S. C.)*, 64 S. E. 238. The following from the charge of the circuit court is the law applicable to these circumstances: "I charge you, as a matter of law, that special damages for losses arising from failure to deliver goods can be recovered if the defendant had notice of the special circumstances at the time of the shipment." This expresses, in substance, the reason given by the circuit judge for refusing to direct a verdict for only \$77. There can be no doubt that the evidence laid a foundation for the jury to find special damages for the delay in the second shipment, and the judgment cannot be reversed for error in the charge.

As to the measure of damages the circuit court charged as follows: "In arriving at these damages I charge you, when the carrier accepts goods for transportation with notice that the owner requires them at the place to which they are to be carried for a special business purpose, the measure of damages for delay in carriage is the expense and detriment to the special business, with reference to which the carriage was undertaken, fairly attributed to the delay, including expense and loss of time reasonably incurred in the effort to find the delayed property, or anything of that sort. This does not include speculative profit resting on the mere hope of particular future transactions." This instruction was very general, but there was no exception to it as a statement of the law. The defendant, however, made a motion for a new trial on the ground that there was no evidence to support a verdict for \$617. The exception on this point must be sustained. The plaintiff's business had not been launched, and therefore he could not recover profits he expected to make. *Tappan & Noble v. Harwood*, 2 Speer, 536; *Bird v. Tel. Co.*, 76 S. C. 345, 56 S. E. 973; *Standard Supply Co. v. Carter & Harris*, 81 S. C. 181, 62 S. E. 150. The mill was not erected, and it was impossible to anticipate the conditions which would exist at the time of completion. Indeed, it might be that the mill would never be completed. For these reasons there would be no reasonably certain basis upon which to compute the measure of damages for rental value, as in the case of the stoppage of a completed ginning plant, like that in *Standard Supply Co. v. Carter & Harris*, *supra*. The true measure of damages, there-

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fore, in this case is the loss to the business of constructing a mill—not running a mill. The loss to the business of construction was the interest on the money invested in the work of construction, and the wages of the laborers employed for construction, reduced by the earnings which the plaintiff either received, or by reasonable diligence could have received, from the employment of such laborers in other work. *Saluda Mfg. Co. v. Pennington*, 2 Speer, 746. There was nothing in the record to show the exact day on which the second shipment was ordered, but it was alleged by the plaintiff that it was about 10 days after notification to Estes of special damages. Taking the view most favorable to the plaintiff, and assuming the date to be 14th August, it was only 23 days from that time to the arrival of the freight on 6th September. The plaintiff employed six hands, and paid them \$10 a month and board. There was nothing in the record to show that the interest on the capital invested in the sawmill outfit was very large; and the sum of these losses, even leaving out of consideration a reasonable return which the plaintiff might have derived by ordinary diligence in engaging his laborers in other work, must have been far less than \$617, and that finding by the jury was plainly excessive.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded for a new trial.

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(Court of Appeals of Kentucky, March 2, 1909.)

[116 S. W. Rep. 765.]

Carriers—Carriage of Goods—Delay in Delivery—Liability of Carrier.—A shipper claiming special damages for delay in a shipment of goods intended to be followed and sold by him at the point of destination cannot recover expenses incurred with knowledge of the fact that the goods had been misdirected.

Carriers—Carriage of Goods—Delay in Delivery.—A shipper claiming special damages for delay in the shipment of goods intended to be sold by him at the point of destination cannot recover for loss on goods returned to him undamaged, in the absence of proof that the market price at the point of destination was greater than that at the place of shipment.

Damages—Grounds—Natural Consequences of Breach of Contract.—For a breach of contract, the party in fault can be held liable for such consequences only as may be reasonably supposed to have been in contemplation of both parties when the contract was made.

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Carriers—Carriage of Goods—Delay in Transportation—Actions for Delay—Damages.*—A carrier having no notice at the time of shipment that the shipper intended to follow the goods and sell them at the point of destination is not liable for special damages arising from delay in shipment, such as loss of the shipper's time and expenses incurred by him in following the goods in ignorance of the delay.

Appeal and Error—Review—Harmless Error—Evidence.—Where plaintiff, a shipper, claiming special damages for delay in a shipment of goods, did not show himself entitled to recover because there was no proof that defendant was aware of the special circumstances under which the goods were shipped, error in admitting evidence for defendant showing when the goods were delivered to its connecting carrier was not prejudicial to plaintiff.

Appeal from Circuit Court, Hart County.

"Not to be officially reported."

Action by T. C. Franklin against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

S. M. Payton, for appellant.

C. H. Moorman and *Benjamin D. Warfield*, for appellee.

CLAY, C. The plaintiff, T. C. Franklin, instituted this action against the defendant, Louisville & Nashville Railroad Company, to recover damages growing out of delay in shipment of freight. The jury found for the defendant. From the judgment based on the verdict, this appeal is prosecuted.

It appears from the record that on December 6, 1906, plaintiff delivered to defendant a trunk of goods at Horse Cave, Ky., to be transported to Oakdale, La. About a week later plaintiff and his son followed the goods to Oakdale, expecting to find them there on their arrival. They remained in Oakdale two or three days, but the goods did not arrive. They then returned home, reaching there on the 23d or 24th of December. Several weeks later the goods were returned to plaintiff intact and undamaged. Plaintiff based his action on the fact that the goods were misdirected to Oakdale, Miss., and that the defendant failed to deliver the goods at Oakdale, La., within a reasonable time. Plaintiff charged in his petition that he, in ignorance of the fact that the goods had been misdirected, went to Oakdale, La.; that because of the failure of defendant to deliver the goods within a reasonable time he was damaged in the sum of \$521.67. This damage was made up of the following items: Loss on 39 overcoats, \$117; loss on 72 coats and vests, \$144; cost of two tickets to Oakdale, La., \$39; cost of two return tickets to Horse Cave, Ky., \$33; conveyance to Horse Cave from Knob Lick, \$7; re-

*See second foot-note of preceding case.

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turn conveyance from Horse Cave, \$5; hotel bill for two, 13 days at Oakdale, \$52; freight on lost trunk, \$19.87; lost time of claimant, 13 days at \$5, \$65; same for salesman, 13 days at \$3, \$39. It was charged in the petition that the defendant agreed to deliver the goods at Oakdale, La. Defendant denied making such a contract, and alleged that the contract was simply to deliver the goods to its connecting carrier at New Orleans.

The only ground urged for reversal is that the court erred in permitting defendant to exhibit to the jury the waybill which showed when the trunk of goods was delivered to defendant's connecting carrier. In our opinion the admission of this evidence was not prejudicial to the substantial rights of plaintiff. While plaintiff claims that he, in ignorance of the fact that the goods had been misdirected, went in company with his son to Oakdale, La., his son's testimony shows that he saw the waybill prior to his departure. If, then, he saw the waybill and knew that the goods had been misdirected, he certainly could not with knowledge of this fact undertake the trip in question and charge all the expenses to the defendant because the goods did not arrive in time. Furthermore, plaintiff was not entitled to recover on the two items for the loss of 39 overcoats and 72 coats and vests for the reason that the goods were not lost at all, but were returned to him. Nor was there any satisfactory proof that the market price of the goods at Oakdale was greater than that at Horse Cave. The other items of loss, consisting of plaintiff's expenses to Oakdale and return, loss of time, etc., were special damages. It was not alleged in the petition, nor was it developed in the proof, that at the time the goods were shipped information was brought home to defendant's agent that the plaintiff intended to follow the goods and dispose of them in Oakdale, La. The law is well settled that for a breach of contract the party in fault can be held responsible for such consequences only as may be reasonably supposed to have been in contemplation of both parties at the time the contract was entered into. No consequence, which is not the necessary ordinary result of the breach, can be supposed to have been so contemplated unless at the time of entering into the engagement full information was imparted to the party sought to be held liable. *Western Union Telegraph Co. v. Cleaver*, 13 Ky. Law Rep. 301; *N. N. & M. R. Co. v. Reed*, 10 Ky. Law Rep. 1020; *E. & P. R. R. Co. v. Pottinger Bros.*, 10 Bush, 185; *Patterson v. Illinois Central R. Co.*, 123 Ky. 783, 97 S. W. 426. As the damages sought to be recovered in this case were simply special damages, and as no notice was brought home to defendant's agent at the time the contract of shipment was made of the special circumstances under which the goods were shipped, the defendant must have been unaware that such special damages would arise from the delay.

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Our conclusion, then, is that plaintiff did not show himself entitled to recover at all, and that a peremptory instruction should have gone for the defendant. That being the case, the error complained of was not prejudicial.

Judgment affirmed.

R. H. OLIVER & SON *v.* CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Arkansas, March 1, 1909.)

[117 S. W. Rep. 238.]

Statutes—Validity—Effect of Partial Invalidity—Divisibility of Act.—Laws 1907, Act No. 193, p. 453, § 1, requires railroad companies to furnish cars, within six days of the filing of an application therefor by shippers, absolutely and unconditionally, and imposes a penalty for failure to comply with the requirement. Section 17 provides that interstate railroads shall furnish cars on application for interstate shipments the same as other cars are to be furnished by interstate railroads under the act. Held that, as the act refers to shipments each one of which would be either interstate or intrastate, and consequently either for the application of the federal law, or free from its provisions, there would be no confusion in enforcing it as to either interstate or domestic business alone, and hence, though it were void as to interstate business, it could be enforced within the state as to domestic business.

Carriers—Carriage of Goods—Statutory Regulation—Validity—Failure to Provide Cars.—That Laws 1907, Act No. 193, pp. 454, 463, §§ 1, 17, requiring railroad companies to furnish cars within six days of application therefor made the duty to furnish cars absolute, and did not expressly provide for reasonable defenses to be interposed, did not render it unconstitutional, since the whole law is not in the legislative act, but in the Constitution and higher rights of property, and a failure of a railroad company to furnish cars under the act would merely establish prima facie a breach of duty, which would not preclude the right to set up such defense as would excuse or justify the failure.

Carriers—Duty to Furnish Cars—Liability for Failure—Unusual Emergencies.*—Except in cases of extraordinary and unusual emer-

*For the authorities in this series on the subject of the duty of railroads, as common carriers, to furnish cars and other facilities, and without discrimination, see foot-note of *United States v. Norfolk & W. Ry. Co.* (C. C. A.), 21 R. R. R. 207, 44 Am. & Eng. R. Cas., N. S., 207; first foot-note of *Missouri & N. A. R. Co. v. Sneed* (Ark.), 29 R. R. R. 652, 52 Am. & Eng. R. Cas., N. S., 652; foot-note of *St. Louis S. W. Ry. Co. v. State* (Ark.), 29 R. R. R. 627, 52 Am. & Eng. R. Cas., N. S., 627; first foot-note of *Lovestor & Co. v. Southern Ry. Co.* (N. Car.), 29 R. R. R. 691, 52 Am. & Eng. R. Cas., N. S., 691; first foot-note of *Chicago, etc., R. Co. v. Morris* (Wyo.), 28 R. R. R. 654, 51 Am. & Eng. R. Cas., N. S., 654; second foot-note of *Di Giorgio, etc., Co. v. Pennsylvania R. Co.* (Md.) 26 R. R. R. 343, 49 Am. & Eng. R. Cas., N. S., 343.

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gencies, which cannot reasonably be anticipated by railroad companies, it is their duty to equip themselves with sufficient cars to supply the demands for shipments, both interstate and intrastate, and a failure to furnish all cars demanded under other circumstances will not be excused.

Statutes—Statutes Partly Valid—Test of Constitutionality.—In determining whether a statute partly constitutional is so divisible that the valid portion may stand, the test is the sufficiency, for practical working purposes, of the portion remaining after the provisions of the Constitution have been applied, and legislative acts will be enforced though in some parts unconstitutional, and regardless of whether a line of cleavage can be pointed out, except such as results from an application of the Constitution.

Battle and Wood, JJ., dissenting.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by R. H. Oliver & Son and others against the Chicago, Rock Island & Pacific Railway Company. Judgment for defendant, and plaintiffs Oliver & Son appeal. Reversed.

Act No. 193, p. 453, Acts 1907, is entitled "An act to regulate freight transportation by railroad companies doing business in the state of Arkansas." Section 1 requires railroad companies to furnish cars within six days of the filing of an application therefor by shippers, and provides that for a failure to comply with this section of the act the railroad company so offending shall forfeit and pay to the shipper applying the sum of \$5 per car per day or fraction of a day's delay after the expiration of free time. The requirement to furnish cars upon application is absolute and unconditional. Section 17 of the act contains the following clause: "Interstate railroads shall furnish cars on application for interstate shipments the same in all respects as other cars are to be furnished by interstate railroads under the provisions of this act."

J. H. Harrod, for appellants.

Buzbee & Hicks, for appellee.

NORTON, Special Judge (after stating the facts as above). When disposed of in the lower court, the complaint stood as one for the recovery of the penalty of \$5 per day for failure to furnish cars, under Act No. 193, approved April 19, 1907 (Laws 1907, p. 453). To this complaint a demurrer was interposed. The record discloses that the purpose for which the cars were demanded was the transportation of wood from Galloway to Little Rock. It is conceded that the cars were wanted for intrastate business. It is also conceded by council that the legislation in question is unconstitutional and void with reference to

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intrastate business. Upon this point we express no opinion. Treating it for the purposes of this case as void as to interstate business, the question is, Must it be held void with reference to intrastate business also? Federal control of interstate commerce is not more plenary than the state's control of domestic business. In fact, it is even less so in a particular not necessary to the decision of this case; that is, that while federal control of interstate commerce may be somewhat affected by the police regulations of a state, there is probably no way in which the state's regulation of domestic commerce can be qualified, except as it may be done by provisions of the state's Constitution, or those higher rights of property which are superior to constitutional sanction. At first view, there seems to be ample room and conflict between federal and state laws dealing with commercial subjects, and many adjudications show this to be true. The difficulty, however, when present, is in the nature of the case, or in the nature of the legislation. When, as in this case, the controversy is connected with the shipment of goods, the difficulty cannot arise, for every shipment will be to a point within the state, or to a point without the state, and consequently one for the application of the federal law, or one free from its contact. It seems there could, as to domestic business, be no objection to the continued enforcement within a state of a statute broad enough in its terms to include interstate business. To the extent that it contemplated, or in its operation affected, any regulation of interstate business it would be void; but that would be the limit of its invalidity, and in all other matters it would stand to be enforced. This view would seem to be reasonable, and that it is the view of the Supreme Court of the United States can clearly be gathered from the cases of *Central of Georgia Railway Company v. Murphey*, 196 U. S. 194, 25 Sup. Ct. 218, 49 L. Ed. 444, and *Houston & Texas Central Railroad v. Mayes*, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772. In this last case we find the following pertinent statement: "As the power to build and operate railways, and to acquire land by condemnation, usually rests upon state authority, the Legislatures may annex such conditions as they please with regard to intrastate transportation, and such rules regarding interstate commerce as are not inconsistent with the general right of such commerce to be free and unobstructed." It is conceivable that a state regulation of domestic commerce could, in its operation, impair the usefulness of common carriers as to interstate business. There is, however, nothing in the act under consideration to prompt us to say that its enforcement as a state regulation would necessarily have such effect.

It is next contended that the act is unconstitutional because its requirement that cars be furnished is absolute and unconditional; that is, it does not mention anything that would justify

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or excuse the failure. In support of this contention we are referred to the case of *Houston v. Mayes*, *supra*. We cannot accept it as controlling. The Texas statute there involved, like the one under investigation, required the cars to be furnished; but, unlike the one here in question, it had a proviso as follows: "That the provisions of this law shall not apply in cases of strikes or other public calamities." This provision could well bring in for application the doctrine that the exception strengthens the rule, and that the statute, by enumerating these excuses, intended to exclude all others. But the stronger reason for refusing the application of that case to this lies in the fact that the Supreme Court of the United States there refused enforcement upon the ground that the requirement that cars be furnished transcended the right of the state, through its police power, to burden interstate commerce. This, it will be seen, is a reason without force as to intrastate business. In *St. L., I. M. & S. Ry. Co. v. Hampton* (C. C.) 162 Fed. 693, there is nothing to indicate that it was with reference to intrastate business. Dealing as we are with intrastate business, the question becomes one to be determined by the law of the state. Must the act be held unenforceable as a state law for the reason that it does not upon its face expressly provide for reasonable defenses to be interposed when actions may be brought under it? The whole law is not in the act of the Legislature; it is partly there, partly in the Constitution, and partly in the higher rights of property that the courts will always protect. The demurrer raises the question of the legal sufficiency of the complaint under law; that is, under the whole law. The question is not new. An act of February 3, 1875 (Laws 1874-75, p. 133), in its first section (Kirby's Dig. § 6773), provided that: "All railroads which are now, or may hereafter be built and operated in whole or in part in this state shall be responsible for all damages to persons and property done or caused by the running of trains in this state." This enactment provided for no defenses, but it was construed by the court in a way that let in all proper defenses, and was given the effect of making railroads *prima facie* liable only. *L. R. & Ft. S. Ry. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55. The principle has been familiar in the jurisprudence of this state for a generation, and we hold it applicable in this case. The failure to furnish cars under the terms of the act under investigation will establish *prima facie* a breach of duty on the part of the railroad companies. This will not preclude their right to set up such defense as will excuse or justify the failure. That a fair division of cars with interstate business made it impossible to answer all demands made for cars for intrastate business would apparently be within the limit of proper defenses, in cases of demands too unusual to be foreseen; and, viewed in this way, the act is relieved of the imputation of burdening in-

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terstate commerce. Except in cases of extraordinary and unusual emergencies which cannot reasonably be anticipated by railroad companies, it is their duty to equip themselves with sufficient cars to supply the demands for shipments, both interstate and intrastate, and a failure to furnish all cars demanded under other circumstances would not be excused. *M. & N. A. Ry. Co. v. Sneed*, 85 Ark. 293, 107 S. W. 1182; *St. L. S. W. Ry. Co. v. State*, 85 Ark. 311, 107 S. W. 1180, 122 Am. St. Rep. 33; 2 Hutchinson on Carriers, § 495.

Another contention is that the legislation, being void as to interstate business, must be void for all purposes, upon the ground that the enactment is indivisible. In cases where legislative acts are assailed as unconstitutional, it is probable the divisibility of the statutes has been given more prominence than it is entitled to. In a sense it may amount to divisibility at last, but apparently the test should be the sufficiency for practical working purposes of that portion of the act remaining after the provisions of the Constitution have been applied. This would seem to be right, for it gives effect to the legislative intent, qualified by the superior force of the constitutional intent, and it gives the citizen (individual or corporation) the benefit of the Constitution, which is all that can be asked. The spirit of our adjudications is in harmony with this view; and the practice of the court, which we have no desire to change, has been to give some force and effect to legislative action, even when unable, under the Constitution, to give all the force and effect the language of the act would require. An apt illustration is the treatment given the legislative provision that tax deeds should be conclusive evidence of the truth of their recitals. There was no way to say the provision was divisible, for it was a single idea. The court refused to enforce it, saying that the truth could not be concluded in that way; but the tax deed was allowed to have the effect of *prima facie* establishing the truth of its recitals, and thereby the legislative intent was given some effect. *Cairo & Fulton Ry. Co. v. Parks*, 32 Ark. 131. It is not necessary to gather all of our adjudications consistent with this view. Some of them, with varying facts, are: *State v. Kate Marsh*, 37 Ark. 356; *State v. Deschamp*, 53 Ark. 490, 14 S. W. 653; *Fones Hdw. Co. v. Erl*, 54 Ark. 647, 17 S. W. 77, 13 L. R. A. 353; *Morrison v. State*, 40 Ark. 448; *Ry. Co. v. State*, 56 Ark. 166, 19 S. W. 572; *L. R. & Ft. S. Ry. Co. v. Worthen*, 46 Ark. 312; *Leep v. Ry. Co.*, 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109; *Hammond Pckg. Co. v. State*, 81 Ark. 519, 100 S. W. 407, 1199; *Cairo & Fulton Ry. Co. v. Parks*, 32 Ark. 131; *McGehee v. Mathis*, 21 Ark. 40. From these cases and others it is plain that in this state legislative acts will be enforced though in some parts unconstitutional, and regardless whether a line of cleavage can be pointed out or not, except such as re-

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sult from an application of the provisions of the Constitution. But if the rule for this state was otherwise, would it avail the appellee? Not if we are correct in our declaration that because of the divisible nature of the subject-matter—into domestic and interstate business—the act, as a whole, may be valid as to one and void as to the other.

The demurrer should have been overruled. The cause is reversed.

BATTLE and WOOD, JJ., dissent.

GREGORY v. GEORGIA GRANITE R. CO.

(Supreme Court of Georgia, May 13, 1909.)

[64 S. E. Rep. 686.]

Railroads—Duties—Liabilities.*—In accepting a charter from the state containing a grant of rights and franchises, a railroad company impliedly assumes the duty of public carrier, and cannot divest itself of its public duties nor shirk its liabilities by allowing another corporation, without legislative authority, to take possession of its track and operate cars thereon.

Railroads—Defective Track—Liability.†—Where a railroad company without legislative authority permits another corporation to exercise the franchise of running cars drawn by steam over its track, the company owning the road is liable for an injury due to the defective construction of the track, as though such company itself were operating the cars.

Carriers—Carriage of Passengers—Who Are Passengers.‡—Where a railroad company verbally consents for a quarry company to operate cars on its track, and the quarry company transports over such road its employees to and from their work, an employee of the quarry com-

*See foot-note of *Kaufman v. Pittsburg & C. S. R. Co.* (Pa.), 27 R. R. 597, 50 Am. & Eng. R. Cas., N. S., 597; second head-note of *American Lumber Co. v. Tombigbee Valley R. Co.* (Ala.), 30 R. R. 47, 53 Am. & Eng. R. Cas., N. S., 47.

†For the authorities in this series on the question whether a railroad company is liable for the torts of another company committed while the latter is using its road, see second foot-note of *Hollins v. New Orleans & N. W. R. Co.* (La.), 28 R. R. 283, 51 Am. & Eng. R. Cas., N. S., 283; foot-note of *St. Louis, etc., Co. v. Chappell & Billingsley* (Ark.), 24 R. R. 789, 47 Am. & Eng. R. Cas., N. S., 789, where all those preceding it are collected; first head-note of *O'Bannon's Adm'r v. Southern Ry.* (Ky.), 30 R. R. 416, 53 Am. & Eng. R. Cas., N. S., 416.

‡For the authorities in this series on the question whether a lessor railroad is liable for injuries to the lessee's servants, see foot-note of *Travis v. Kansas City, etc., Ry. Co.* (La.), 24 R. R. 694, 47 Am. & Eng. R. Cas., N. S., 694; foot-note of *Illinois Cent. R. Co. v. Shergog's Adm'r* (Ky.), 24 R. R. 672, 47 Am. & Eng. R. Cas., N. S., 672.

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pany who has no connection with the operation of the train while being so transported sustains to the railroad company the relation of passenger to the extent that the railroad company and its licensee is bound to exercise extraordinary diligence to keep from injuring him.

Appeal and Error—Review—Discretion of Trial Court—New Trial.—Where there have been two concurring verdicts for the plaintiff, and no error of law has been committed, and the verdict is amply supported by the evidence, and the trial judge states in his order granting a new trial that he does so mainly because in his opinion the evidence does not sustain an essential allegation of the plaintiff's petition, the judgment granting a new trial will be reversed where it appears that the trial court erred in deciding as to the legal effect of the evidence, which influenced him in granting a new trial.

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Personal injury action by J. E. Gregory against the Georgia Granite Railroad Company. There was a verdict for plaintiff, which was set aside and a new trial granted, and plaintiff brings error. Reversed.

Hulsey & Field and *J. D. Kilpatrick*, for plaintiff in error.

Westmoreland Bros. and *Howard & Bolding*, for defendant in error.

EVANS, P. J. The Georgia Granite Company, a corporation, owns and operates a quarry about three miles distant from Lithonia, a station on the Georgia Railroad. In 1904 the Georgia Granite Railroad Company, a corporation chartered under the general railroad law by the Secretary of State, constructed a railroad from the quarry to Lithonia. For the sake of brevity hereafter we shall refer to the Georgia Granite Company as the quarry company and the Georgia Granite Railroad Company as the railroad company. The same person was the president of both corporations. The secretary and treasurer of the railroad company was the general manager of the quarry company and the vice president of the railroad company was the superintendent of the quarry company. The railroad company had no equipment, and, immediately after the completion of its track, the quarry company used it in transporting their output to Lithonia. The quarry company has an engine, but no cars, and the cars which it uses are furnished by the Louisville & Nashville Railroad Company, which operates the Georgia Railroad as lessee. The quarry company employs the engineer, the fireman, and trackmen, who operate the railroad and keep up its track. There is no formal written lease from the railroad company to the quarry company, and the latter operates the road under verbal arrangement, whereby the quarry company pays the en-

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gineer, fireman, and trackmen, and charges this expense to the railroad company. The terminus of the railroad at the quarry is called Rock Chapel, and there are two road crossings between Rock Chapel and Lithonia. In addition to transporting the product of the quarry, the quarry company also hauled fertilizers, cotton seed, and lumber for other persons, and collected freight for the same. Neither the quarry nor the railroad company maintained a ticket office or freight depot, nor was any fare ever charged or collected for carrying passengers. It was usual and customary for the quarry company to haul its employees to and from their work on the train, and to this end they left Lithonia after the arrival of the early passenger train on the Georgia Railroad for the accommodation of its employees who came daily by that train. It was also usual to stop at the road crossings between Lithonia and Rock Chapel to allow its employees to get aboard or leave the train. It was customary, not only to haul the employees of the quarry company, but also any other person in the community who wished to ride; and this custom was known to the railroad company and quarry company. In December, 1905, J. E. Gregory, an employee of the quarry company, whose work was not at all connected with the operation of the locomotive or train, while riding with numerous other employees from his work, was injured by the derailment of a car. He sued the railroad company for damages, alleging that he was riding on this car with the knowledge and sanction of the vice president and superintendent of the railroad company; that he had paid no fare as a passenger, and did not expect to be called on to pay any fare as a passenger, but that he was able and willing and ready to pay fare had any been demanded of him; and that the derailment of the car due to the defective construction and maintenance of the track. The defendant denied liability, and especially that it was negligent as charged. The plaintiff prevailed, and a new trial was granted. The case was again tried, and the plaintiff obtained a second verdict, which was set aside on motion for a new trial; and it is to this judgment that the plaintiff excepts. In the order granting a new trial the judge stated that it was granted mainly on the ground that the evidence failed to establish the relation between the plaintiff and the defendant of passenger and carrier, as alleged in the petition.

From the identity of the officials of the two corporations, and the cessation of active management by the railroad company after the completion of the line of railroad, and the subsequent operation of it by the quarry company, the railroad tracks seems to have been constructed mainly for the use of the quarry company. The railroad company, after having obtained from the state a charter with authority to exercise the right of eminent domain, by virtue of which it laid its track, cannot afterwards surrender the exclusive use and control of its track to a private

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corporation for private purposes. In accepting the grant of rights and franchises from the state a railroad corporation impliedly assumes the duty of a common carrier. The consideration of the grant is the undertaking of the corporation to impartially perform this public duty. 4 Elliott on Railroads, § 1392. A railroad company cannot divest itself of its public duties nor shirk its liabilities by simply allowing another corporation to take possession of its track and operate cars thereon. *Ga. R. Co. v. Haas*, 127 Ga. 193, 56 S. E. 313, 119 Am. St. Rep. 327; Civ. Code 1895, § 1864. It was held in *Macon & Augusta R. Co. v. Mayes*, 49 Ga. 355, 15 Am. Rep. 678, that, "where a railroad company permits other companies or persons to exercise the franchise of running cars drawn by steam over its road, the company owning the road, and to which the law has entrusted the franchise, is liable for an injury done, as though the company owning the road were itself running the cars." The theory of liability is that, where a railroad company owning the track suffers or licenses another corporation or person to discharge its public functions without legislative authority, the latter does so as the agent of the former. *Nelson v. Vermont & Canada R. Co.*, 26 Vt. 717, 62 Am. Dec. 614; *Singleton v. S. W. R. Co.*, 70 Ga. 464, 48 Am. Rep. 574. The rule in the *Mayes Case*, *supra*, was held not to apply in case of a lessee operating the lessor's track under legislative authority, so as to make the lessor liable to the servant of the lessee for the negligence of a fellow servant in the operation of a train. *Banks v. Ga. R. Co.*, 112 Ga. 655, 37 S. E. 991; *Killian v. A. & K. R. Co.*, 79 Ga. 234, 4 S. E. 165, 11 Am. St. Rep. 410. In the present case there was no lease as contemplated by Civ. Code 1895, § 2173, and Acts 1899 (Ga. Laws, p. 54), but simply a verbal consent by the railroad company for the quarry company to run its cars over its track at the expense of the quarry company. The act of 1899 provides for a record of a lease contract by a railroad company to another railroad company or a private person, and declares that a failure to record such lease shall make the lessor company liable for an injury caused by the lessee, and that a defense attempting to shift liability to the lessee shall not prevail. So that there can be no doubt that the railroad company is not absolved from liability as a common carrier for an injury caused by the derailment of the car operated by the quarry company, which was due to the defective condition and maintenance of the track simply because it had surrendered its track to the quarry company, and it did not itself otherwise engage in the business for which it was incorporated.

The plaintiff alleged that he was a passenger on the car which was derailed, and relies on the foregoing recital of facts as sufficient to show that he sustained this relation to the defendant at the time of his injury. Although in the employment of the

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quarry company, the duties of his employment were entirely dissociated with the operation of the train. He worked at the quarry, and, in accordance with the general custom of the quarry company, was being transported from his work on its cars when injured. Treating the quarry company as the agent of the railroad company in operating its cars over the latter's track, the servants of the quarry company operating the train relatively to the public were the servants of the railroad company. But the employees of the quarry company, whose work had no connection with the operation of the train, were not the servants of the railroad company. As was said in *Central R. Co. v. Henderson*, 69 Ga. 716: "Though one may be an employee of a railroad company, yet if his agency is disconnected from the running of trains, and while traveling he is injured, he stands in the position of a passenger." In this case the plaintiff was a depot agent of the railroad company, and was traveling on a pass. The exaction of fare by a railroad company is not essential in every case to make one riding on its cars a passenger. "One employed by a railroad company as a telegraph lineman, and who is transported to and from his work free of charge by the railroad company, and who while so traveling has nothing to do with the control or operation of the train on which he is riding, is a passenger to the extent that the company is bound to exercise extraordinary diligence to keep from injuring him." *Carswell v. M. D. & S. R. Co.*, 118 Ga. 826, 45 S. E. 695. The plaintiff was not on the cars by the express permission of the quarry company, but was riding in accordance with a general custom, known to its officials, and daily practiced from the time it began to run its engine over the railroad company's track. The quarry company's permission for him to ride to and from his work will be implied from its general habit of transporting its employees to and from their work. At the time of the injury he was being transported by the agent of the railroad company, to wit, the quarry company. The conclusion we reach is that under the undisputed evidence the plaintiff sustained the relation of passenger to the defendant.

The grounds of the motion for new trial were that the verdict was contrary to law, contrary to evidence, contrary to the charge of the court, and that a certain excerpt from the charge was erroneous. There was ample evidence from which the jury could find that the derailment of the car was occasioned by the defective construction and maintenance of the railroad track, and that the plaintiff's injury was due to the defendant's negligence. The court charged the jury that the plaintiff could not recover unless it appeared from the evidence that he was a passenger, and in defining the relation of passenger and carrier used this language: "What are these elements of fact? First. There must be a carrier of passengers; that is to say, there must be a person, natural or artificial, who must do a business of carrying

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the public. A railroad company would be an artificial person, not a natural person. Second. There must be some person who is willing to be carried by the carrier, and carried under such terms and conditions as the carrier may lawfully prescribe. Third. The actual entry by such person into one of the vehicles furnished by the carrier for the purpose of being carried in accordance with such terms and conditions as the carrier may lawfully prescribe. When these elements of fact are all present, then the relation of carrier and passenger arises." Without stating the very elaborate criticism of this charge, it is manifest that there is nothing therein contained prejudicial to the railroad company. This is the second verdict for the plaintiff, and the court in its order granting a new trial states that he was mainly influenced to grant it because he did not think the evidence was sufficient to establish the relation of passenger. We differ with his honor as to the legal effect of the evidence on this subject. Where there have been two concurrent verdicts for the plaintiff on the same state of facts, and where no error of law has been committed, and where under all the evidence the verdict is not manifestly wrong, the trial judge could not in the exercise of his discretion grant a second new trial. *Dethrage v. Rome*, 125 Ga. 802, 54 S. E. 654.

The grant of the second new trial is reversed. All the Justices concur.

GOEHRING v. BEAVER VALLEY TRACTION CO.

(Supreme Court of Pennsylvania, Jan. 4, 1909.)

[72 Atl. Rep. 259.]

Carriers—When Relation of Passenger Exists—Question for Jury.*

—A borough policeman, not paid by the borough, but by persons needing police protection, rendered services to a traction company in preserving order on its cars, and was paid a small sum, with the right of free transportation. He was asked by a conductor to board a car on an outward trip, and, there being no disorder on the return trip, the conductor asked the policeman to go on the front platform with the motorman, where he was severely injured by the car leaving the track at a curve. Held, that the question whether the policeman was a passenger at the time of the accident was for the jury.

Carriers—Injury to Passenger—Question for Jury.—Whether a policeman riding on the front platform of an electric car and injured when it left the track at a curve was guilty of contributory negligence held for the jury.

*See first foot-note of *Louisville & N. R. Co. v. Cottengin* (Ky.), 25 R. R. R. 659, 48 Am. & Eng. R. Cas., N. S., 659; second foot-note of *Clough v. Grand Trunk Western Ry. Co.* (C. C. A.), 26 R. R. R. 660, 49 Am. & Eng. R. Cas., N. S., 660.

Goehring v. Beaver Valley Traction Co

Appeal from Court of Common Pleas, Beaver County.

Action by Charles W. Goehring against the Beaver Valley Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The court charged, in part, as follows:

"Plaintiff's counsel contends that his business as a night policeman ended at the boundary of Rochester borough, being the middle of the Ohio river, while in the defendant's testimony it is contended that his employment was that of a peace officer throughout their entire lines. On the night of the accident plaintiff, after getting on the car and taking his seat in the regular seats in the interior of the car, alleges that he was directed by the conductor to go on the front platform with the motorman, and it is in testimony on both sides that he stayed there during the entire trip going to Monaca, where they stopped a couple of minutes, during which time he sat with the motorman in the interior of the car, and then again took his place on the front platform with the motorman on the return trip at the instance of the employees of the car. Plaintiff's counsel contend that he was not in the line of his employment on the return trip, but that his duties as night policeman in there were only on the outbound trip from Rochester to the center of the bridge, and that he did not get off after passing that point simply for the reason that he did not want to walk back. Now, we leave this as a question of fact for this jury. Plaintiff could have been an employee with the rights of free passage and at the same time a passenger; that is, his being an employee is not inconsistent also with his being a passenger at certain times upon the company's cars. The question for you then to consider is whether or not on this night in question, under all the testimony in the case, both on the part of the plaintiff and on the part of the defendant, this plaintiff was there as an employee of the company in the line of his duty by virtue of such employment at the time of the accident. If he was a passenger, as we said to you before, the proof of the accident raises the presumption of negligence on the part of the defendant company or of its employees. While, if he was an employee and there in the line of his duty, there is no such presumption of law, and the burden would be upon this plaintiff to satisfy you that there was negligence on the part of the defendant's employees. There must be negligence on the part of the defendant, understand, in either case, but in the case of a passenger this negligence is presumptive from the proof of the accident.

"Having decided, then, this question of fact as to his status as a passenger or an employee on that night and at the time of the accident, you then pass to the question, if you decide he was an employee, whether negligence has been shown affirmatively by

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plaintiff's testimony. If he was an employee and it has not been so shown, defendant is entitled to a verdict at your hands. If a passenger, has the presumption of negligence been overcome by the proof offered by the defendant? If it has, defendant again would be entitled to your verdict. If an employee, and this accident was the result of negligence by a co-employee, such as would be the motorman and the conductor, plaintiff cannot recover, and your verdict must be for the defendant. The only evidence in this case on the part of the plaintiff attempting to explain the cause of this accident is that of the plaintiff himself and one or two witnesses in an effort to show excessive speed of the car. There is no evidence of the plaintiff going to show that the car was defective or that the track was defective or that this accident could have resulted from anything but increased speed upon a downgrade, at the end of which was a curve, causing the car to leave the track at the curve. If this was the fault of the motorman, a co-employee, or was caused in any way by the act of the plaintiff himself, or by virtue of his contributory negligence, then he cannot recover in this action.

"It is one of the undisputed facts in this case that this plaintiff was on the front platform of this car. It was while he was in that position that he received the injuries for which he sues. He excuses himself for being in this position, however, by alleging that he was directed to go there by the conductor, who told him that he did not allow policemen to ride on the seats, or something to that effect. You will remember just what he alleges was said. It is in evidence, undisputed I believe, that there was no rule of the company to that effect, and that the conductor himself denies that he gave any such direction. What, then, was the fact? Was he directed to go there by the conductor, or did he go there voluntarily, as is claimed by the conductor, at the instance of the motorman to talk to him? If he did go there at the positive direction of the conductor, we take it that such direction would have to be obeyed, as the conductor was the manager of that car and in full authority, and he, the plaintiff, would not be necessarily guilty of negligence *per se* in thus obeying the conductor's orders."

Verdict and judgment for plaintiff for \$6,185.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

James L. Hogan and John M. Buchanan, for appellant.

George Wilson and Robert W. Darragh, for appellee.

POTTER, J. The plaintiff in this case was employed as a night policeman for the borough of Rochester, but, instead of being paid by the borough, he received his compensation from business men and firms, who were presumably interested in securing police protection. Among other services which he rendered was

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that of keeping a certain waiting room of the traction company clear of loafers and disorderly persons, and he was also expected to respond whenever called upon by the conductors to aid in preserving order upon the cars of the defendant company. For his services to the defendant in these respects it paid him \$4 a month, and gave him the right of free transportation over all its lines. His earnings as a police officer from other persons and firms whom he served during the same period were apparently more than 10 times what he received from the defendant company. Plaintiff testified that on the night of the accident he was asked by its conductor to board a car running across the river into the borough of Monaca, and that he responded to the request. At first he took a seat inside the car, but was directed by the conductor to go to the front platform with the motorman. He made the trip to the terminus and back, and while he was upon the front platform, and as the car was rounding a curve with what was charged as great and excessive speed, it was thrown from the track, and plaintiff was very severely injured. At the trial of the case it was contended on the part of the plaintiff that he was merely a passenger at the time of the accident, having at the time no police duties to discharge, and that he was under his right to free transportation, merely riding back to the point at which he had entered the car. On the other hand, the defendant company contended that the plaintiff was then acting in the capacity of an employee. This disputed question of fact as to the status of the plaintiff was left to the determination of the jury, and properly so, we think. It is clear from the evidence that upon the return trip of the car there was no disorder and no occasion for interference by the plaintiff in his capacity as an officer. He was entitled to free transportation as part of the compensation for his services. *McNulty v. Penna. R. R. Co.*, 182 Pa. 479, 38 Atl. 524, 38 L. R. A. 376, 61 Am. St. Rep. 721, affirms the doctrine that "a person employed by a railroad company at a certain amount of wages per day and free transportation to and from his home is to be regarded as a passenger while traveling to his home after his day's work is done." In the present case, as that question was carefully submitted to the jury for their determination, the verdict of the jury must be accepted as establishing the fact that the plaintiff was a passenger at the time of the accident; and we know of no principle of law which stands in the way of such a finding. We think the question was properly regarded as one of fact for the jury rather than one of law for the court, and that in this respect the case is within the principle of *Wilkes v. Buffalo, etc., Ry. Co.*, 216 Pa. 355, 65 Atl. 787.

On the question of plaintiff's contributory negligence, the jury were instructed that there could be no recovery if the plaintiff voluntarily took a place upon the front platform when there was

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room for him inside the car. But the undisputed evidence is that the conductor directed plaintiff to go out upon the platform, telling him that the motorman wanted to talk to him. It must be remembered that under the circumstances the position of the plaintiff was not that of the ordinary passenger. He was a peace officer, engaged by the defendant company to aid the men in charge of the car in preserving order whenever the need should arise. He had also the right of free transportation at all times, whether actually discharging police duties or not. Under such circumstances, the rules which would govern an ordinary passenger could not reasonably be applied to the conduct of the plaintiff. He would naturally have occasion for communicating with the men in charge of the car, as ordinary passengers would not. The trial judge could not properly have ruled as matter of law that the plaintiff was guilty of contributory negligence in going from the inside of the car to the front platform in compliance with the direction of the conductor.

Our examination of the record in this case has satisfied us that the questions of whether plaintiff was at the time of the accident a passenger or an employee, the negligence of the defendant, and the contributory negligence of the plaintiff were all properly submitted to the jury in a very careful and impartial charge, of which the appellant has no just reason to complain.

The assignments of error are overruled; and the judgment is affirmed.

CLARK v. COLORADO & N. W. R. Co.

(Circuit Court of Appeals, Eighth Circuit, November 7, 1908.)

[165 Fed. Rep. 408.]

Carriers—Who are Passengers—Invitation of Carrier's Employees.*

—Neither the master mechanic of a railroad nor a conductor, nor an engineer of a train, has any implied authority to agree on behalf of the company to carry a person on such train without payment of fare.

Railroads—Injuries to Persons on Trains—Persons Riding at Invitation of Employees—Riding on Engine.†—One who accepted an in-

*See first foot-note of *Morris v. George R. & B. Co. (Ga.)*, 31 R. R. 209, 54 Am. & Eng. R. Cas., N. S., 209; first head-note of *Clarke v. Louisville & N. R. Co. (Ky.)*, 30 R. R. 542, 53 Am. & Eng. R. Cas., N. S., 542.

†For the authorities in this series on the question whether persons riding on trains or cars by invitation of railroad employees are trespassers or licensees, see second foot-note of *Johnson v. Great Northern Ry. Co. (Wash.)*, 29 R. R. 211, 52 Am. & Eng. R. Cas., N. S., 211, where all those preceding it are collected.

For the authorities in this series on the subject of the care due licensees and trespassers on trains or street cars, see first and last foot-note of *Johnson v. Great Northern Ry. Co. (Wash.)*, 29 R. R. 211, 52 Am. & Eng. R. Cas., N. S., 211.

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itation from the master mechanic of a railroad and a conductor and an engineer of a train to ride in the cab of an engine without payment of fare is presumed to have known that such invitation was without authority, and not only did not become a passenger, to whom the carrier owed the duty of care as such, but assumed all of the known hazards incident to such exposed position; and there can be no recovery from the company for his injury or death, due to such dangerous position, unless caused by the wanton or reckless act of its servants.

In Error to the Circuit Court of the United States for the District of Colorado.

Sterling B. Toney (*Henry V. Johnson* and *R. Burge Toney*, on the brief), for plaintiff in error.

O. L. Dines (*E. E. Whitted*, on the brief), for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. This is an action instituted by the widow of J. F. Clark against the defendant railroad company to recover damages for personal injury resulting in his death. The court sustained a demurrer to the petition, which presented two objections thereto: (1) That the petition does not state facts sufficient to constitute a cause of action; and (2) because it discloses that the deceased was guilty of negligence directly contributing to his injury. The plaintiff below declining to plead further, final judgment was entered on the demurrer.

The substantive facts disclosed by the petition are as follows: The defendant railroad was operated between the city of Boulder and the town of Eldora, in Boulder county, Colo. On the 15th day of July, 1906, the said J. F. Clark was invited by the conductor, engineer, and master mechanic of the defendant company to ride in the cab of an engine drawing a train of cars on said road. While so traveling in said cab the engine collided with the end of a freight car which defendant's employees had run out on a siding of a railroad track, but left the end or corner of said car protruding onto the main track, so that the said engine in passing collided therewith, breaking in the side of the cab on which the said J. F. Clark was sitting or standing, whereby he was killed. The petition alleges "that deceased was not an employee of the defendant company and was not a passenger for hire; that is, was not required to pay for traveling on said car." The prayer of the petition is for \$25,000 damages.

It will be observed that, while the petition discloses that the engine in question was drawing a train of cars, it does not allege that it was a train of passenger cars, adaptable to and used for the carriage of passengers. *Non constat*, it may have been a

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freight train, which did not carry passengers at all. Therefore the case presented by the petition is that the deceased, without paying or agreeing to pay any fare, establishing a contractual relation between him and the carrier for his safe carriage, voluntarily entered into the cab of a locomotive engine to take a free ride for his own accommodation.

To avoid the obvious nonliability of the defendant railroad company for said Clark's death, the petition alleges that he was so much in their personal favor that he received simultaneously an invitation from the conductor, the engineer, and the master mechanic to ride in the engine cab. As the petition does not aver that either of said employees had authority to extend such invitation, the authority must arise, if at all, from mere implication. Most certainly no such authority can be assumed to have resided with the master mechanic, who had no connection whatever with the operation of the railroad train while running. Judge Caldwell, in *Condran v. Chicago, M. & St. P. Railway Company*, 67 Fed., loc. cit. 523, 14 C. C. A. 508, 28 L. R. A. 749, said:

"It is a matter of common knowledge, of which the court will take judicial notice, and of which the public are bound to take notice, that railroad passenger trains are operated to carry passengers for hire. They are not eleemosynary agencies. It is equally well settled that the authority of a railroad conductor does not extend to the carrying of passengers without the payment of the regular fare."

So Judge Sanborn, in *Purple v. Union Pacific Railroad Company*, 114 Fed., loc. cit. 126, 51 C. C. A. 567, 57 L. R. A. 700, said:

"A contract is indispensable to the relation of carrier and passenger. The minds of the parties must meet upon the agreement that the carrier will transport and the passenger will pay for the transportation, in the absence of a specific agreement or permission by the proper officer of the transportation company that the latter will carry the passenger without compensation. This contract of carriage may, it is true, be express or implied; but, if it does not exist in either form, the relation of carrier and passenger cannot have been created. An implied agreement to pay fare, and hence the relation of carrier and passenger, undoubtedly arises where one enters a passenger car and rides towards his destination. But it is equally true that if one enters and rides under an express or implied agreement with a conductor, whom he knows or has reasonable cause to believe has no authority to make such a contract, that he shall not pay his fare, but shall cheat the company out of the transportation, no contract of carriage is created; but the existence of such an agreement is conclusively negated by the actual fraudulent contract, so that it cannot exist."

As the petition alleges that the deceased was not a passenger

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for hire, he knew, what every man is presumed to know, that the railroad was being operated for hire. If so, he knew that he was cheating the railroad out of its rightful due, as he certainly understood that the men whose guest it is claimed he was were not to pay it for him. Every sensible man comprehends that, while a railroad conductor is in charge of the train, he is placed there by the company to collect fares from passengers, and if he neglects this duty he is wronging his employer. His very position and office as conductor advise every person who enters upon the train to be carried that, presumptively, he is without authority to carry him free of charge. He also knows that the engineer in his cab has nothing to do with the admission of a passenger to the train for carriage. Much less had either the engineer or the conductor authority to invite the deceased to take passage in the engine cab. The law imputed to him, when he entered the cab, knowledge of the fact that the railroad company had not constructed or designed such a place for the carrying of passengers. It is a place fashioned and intended alone for the engineer and fireman. It is equipped with a narrow seat on the right-hand side for the engineer, and a corresponding seat on the left-hand side for the fireman, with a small space between for the engineer when standing at the throttle of the engine and for the fireman when shoveling coal. It is necessarily exclusive of outsiders, who by their presence and talk are liable to divert the attention of the engineer and fireman from their required constant watchfulness. Public policy itself demands this rule, and forbids any deviation from its observance.

The authorities are in harmony in holding that in a place like an engine cab, drawing a train of cars, the person who voluntarily enters therein to ride is presumed to know that it is not designed for such use, and no presumption arises in favor of such person that the engineer and conductor have either express or implied authority to grant him such permission. *Robertson v. N. Y. & E. R. R. Co.*, 22 Barb. (N. Y.) 91; *Powers v. Boston & M. R. Co.*, 153 Mass. 188, 26 N. E. 446; *Eaton v. Delaware, L. & W. R. Co.*, 57 N. Y. 382, 15 Am. Rep. 513; *Files v. Boston & A. R. Co.*, 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411; *Whitehead v. St. Louis, I. M. & S. Ry. Co.*, 22 Mo. App. 60. While some courts have gone to considerable length in holding railroad companies responsible for the acts and assumptions of their employees while in positions of apparent authority, yet, when requested to hold that there is any presumption in favor of the authority of the employees to permit third persons to use places and instrumentalities obviously not designed therefor by the master, they come to a halt. If a conductor or engineer should invite a person to ride on the cowcatcher, a cross-beam in front of the engine, or on a brake-beam of a moving car, the foolhardy acceptor, receiving an injury thereby, would not be heard to say

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that he assumed the conductor or engineer had authority from the railroad company to invite him to ride there.

By voluntarily entering the engine cab to ride, the deceased assumed all the known hazards incident to such exposed position, because it is not a place designed by the railroad company for carrying passengers, and because it is a known place of increased danger. If a bridge be down, or any obstruction be on the track, the engine first encounters the danger and incurs the disaster. Danger lurks in such position. It was the side of the cab on which Clark stood or sat that first encountered the projecting end or corner of the car on the side track. The side of the cab was crushed in, which occasioned his injury. No derailment of, or other injury to, the train is alleged. So the fact is confronting that, had the deceased not chosen to ride where he did, no harm would have come to him. In voluntarily assuming such extrahazardous position he was guilty of contributory negligence. This proposition of law has recently been announced by this court in *Chicago G. W. Ry. Co. v. Mohaupt* (C. C. A.), 162 Fed. 665. It is reinforced by the following pertinent decisions: *Doggett v. Illinois C. R. Co.*, 34 Iowa, 284; *Radley v. Columbia Southern R. Co.*, 44 Or. 332, 75 Pac. 212; *Texas & P. R. Co. v. Boyd*, 6 Tex. Civ. App. 205, 24 S. W. 1086; *Files v. Boston & A. R. Co.*, 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411, and citations; *St. Louis, K. C. & C. R. Co. v. Conway* (C. C. A.), 156 Fed. 234, 235.

Counsel for plaintiff in error placed great stress in argument upon the contention that, notwithstanding the deceased may have been in an improper place on the engine, he was not a trespasser, but a licensee, and therefore the company owed him the duty not to wantonly or recklessly injure him. This may be conceded. The contention of counsel is that the petition charges gross negligence in the switching crew of the defendant company leaving the end of the freight car on the siding so as to conflict with the main track. In the first place, there is no allegation in the petition of wanton and reckless conduct by the defendant's employees. "The term 'gross,' in this connection, is nothing but an epithet. It means no more than the failure to exercise ordinary diligence in the circumstances of the particular case. It distinguishes no legal degree of negligence, and it is not error to refuse to apply it to the negligence for which a defendant may be liable, because its use merely tends to create doubt and to increase confusion." *Purple v. Union Pacific R. Co.*, 114 Fed., loc. cit. 130, 51 C. C. A. 571 (57 L. R. A. 700).

Even had the petition charged wantonness or recklessness in the switching crew, as applied to the instance at bar it would not have helped the case. The following excerpt from the well-considered opinion in *Eaton v. Delaware, L. & W. R. Co.*, 57 N. Y., loc. cit. 394, 15 Am. Rep. 513, presents the correct rule:

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"But it is said that by the act of the conductor the plaintiff was lawfully on the train, and that for this reason the defendant was liable to him for the negligence of its servants. With due submission, this is simply begging the question. The plaintiff could only be lawfully on the train by an authorized act of the conductor. The question still recurs: Had the conductor the authority to take plaintiff on the train? If not, he could not lawfully be there. It is not necessary to consider whether he was a trespasser. It is enough to hold that a duty to be careful toward him would only spring up on the part of the defendant by an act on the conductor's part coming within the scope of his authority."

The switching crew did not know that the deceased was on the engine, and had no reason to anticipate that any passenger would be in such exposed position. Nor did the engineer or conductor know or have reason to anticipate that the freight car extended onto the main track. While it is to be conceded that it was a culpable, negligent act on the part of the switching crew in not taking pains to see that the freight car cleared the main track, the deceased, in voluntarily riding in the engine cab—a place not designed for the carriage of passengers, and in which he would obviously be exposed to first encounter any obstruction that might be on the track—was none the less guilty of contributory negligence.

Counsel for plaintiff in error rely chiefly upon the case of *Philadelphia & Reading Railroad Company v. Derby*, 14 How. 468, 14 L. Ed. 502. It is deemed sufficient to say of that case that the pronouncements therein are predicated of a state of facts distinctively distinguishable from the case at bar: (1) The cab there spoken of, in which the injured party was riding, was evidently not such an engine cab as the one here in question. It was a carrying car, constructed and designed for the president and officials of the railroad on inspection tours, and the like, and was, therefore, a place for carrying passengers. (2) The injured party was a stockholder in the company, and was invited by the president thereof, who had apparent authority therefor, to ride with him in the place designed for the carriage of persons. (3) The employees of the company in charge of the track had special instructions to keep it clear of obstructions because of the coming, on this specially equipped car, of the officials of the road, who could be expected to be where they were riding when the car came.

Other decisions cited in the brief of counsel for plaintiff in error are not in point in their facts, and are not of controlling authority.

It results that the judgment of the Circuit Court must be affirmed.

REED v. CHICAGO, B. & Q. R. Co.

(Supreme Court of Nebraska, March 20, 1909.)

[120 N. W. Rep. 442.]

Action—Nature of Action—Contract or Tort—Carriage of Passengers.—In an action against a railroad company, plaintiff alleged the purchase and possession of a mileage ticket, the possession of a freight train permit, and that defendant, disregarding its duties as a common carrier of passengers, wrongfully ejected him from a caboose attached to one of its freight trains, but did not allege any contract to carry him as a passenger or any breach thereof. Held to state a cause of action ex delicto, and not ex contractu.

Carriers—Carriage of Passengers—Right to Exclude from Trains.—Railroad companies may properly designate on what trains passengers may be carried, and may exclude passengers from unscheduled extra freight trains.

Carriers—Carriage of Passengers—Permit to Ride on Freight Trains—Revocation.—A permit issued by a railroad company without consideration, which authorized its train operatives to carry the holder of the permit on freight trains, is a mere license, and may be revoked at any time when the holder is not actually a passenger under it.

(Syllabus by the Court.)

Commissioners' Opinion. Appeal from District Court, Nuckolls County; HURD, Judge.

Action by H. F. Reed against the Chicago, Burlington & Quincy Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

W. A. Bergstresser, for appellant.

James E. Kelby, Halleck F. Rose, T. W. Cole, Frank E. Bishop, and Fred M. Deweese, for appellee.

GOOD, C. In this action, which was for the recovery of damages alleged to have been sustained in consequence of defendant's breach of duty as a common carrier of passengers, the defendant had judgment on an instructed verdict, and plaintiff has appealed.

Plaintiff alleged in his petition that on September 17, 1905, at Sterling, Colo., while he was a passenger on one of defendant's regular freight trains bound for Holdrege, Neb., the defendant, disregarding its duty as a common carrier of passengers, unlawfully and with force and violence ejected and expelled him from the cars of said train, and refused him permission to further ride therein, and that he at the time tendered the conductor in charge of said train a mileage ticket and freight train permit. Defendant in its answer alleged that plaintiff sought to be carried on an

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extra freight train not running as a scheduled train; that before said train started plaintiff was notified that it did not carry passengers, and that he could not ride thereon, and that he abided by said notice; and denied the other allegations of the petition. The evidence discloses that plaintiff, while at Sterling, Colo., on Sunday, the 17th day of September, 1905, desired to go to Holdrege, Neb.; that there were no regular trains leaving until the afternoon of the same day; that plaintiff was informed that an extra freight train was being made up in defendant's yards to go to Holdrege, Neb.; and that plaintiff might ride thereon. He thereupon went to the yards of the defendant and to the way car of the train that was then being made up, and was informed by the conductor that the train was an extra, and did not carry passengers, and that he could not ride thereon. Plaintiff replied that he had a mileage ticket and a freight train permit, and insisted that he was entitled to ride upon the train. When the train was made up, the conductor went to the train dispatcher for his running orders, and there saw the trainmaster, and reported to him plaintiff's desire to ride upon the train, and was by the trainmaster informed that no passengers could be carried upon that train. The conductor returned to the way car and found plaintiff therein, and informed him of the statement made by the trainmaster, and that he could not ride on that train. Plaintiff refused to leave the car. Thereupon the conductor and brakeman took plaintiff by the arms and led him out of the car. The evidence discloses that plaintiff at the time was the possessor of a mileage ticket, a considerable portion of which was unused, and that he had in his possession a freight train permit. It is conceded that plaintiff received no injury to his person or to his baggage, and that the train was an unscheduled "extra freight."

Plaintiff contends that the action is *ex contractu* and a breach of the contract was proved, and that he was in any event entitled to recover nominal damages, and that it was therefore erred to direct a verdict for the defendant. Plaintiff alleges the ownership of the mileage ticket and freight train permit and his expulsion from the train, but does not allege any contract to carry nor any breach of the contract, but does allege a breach of the defendant's duty arising out of his calling as a common carrier of passengers. The question presented is fairly disposed of in *Fremont E. & M. V. R. Co. v. Hagblad*, 72 Neb. 773, 101 N. W. 1035, 106 N. W. 1041, 4 L. R. A. (N. S.) 254. In the opinion in that case it is said: "The petition alleges that the plaintiff purchased a ticket. While it is true that a railroad ticket is evidence of a contract between the carrier and the purchaser thereof, still the plea that the plaintiff purchased a ticket for a passage from Norfolk to Meadow Grove without alleging that the defendant agreed to carry him between those points in

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consideration of the sum paid, and alleging, further, a breach of the contract, does not set forth an action *ex contractu*. 15 Ency. Pleading & Practice, p. 1125, and notes. "There is a class of cases arising out of contract, where, by reason of the contract, the law raises a duty for the breach of which duty an action on the case may be maintained; and in such cases the contract, being the basis and gravamen of the suit, must be alleged and proved. But when the gist of the action is a breach of duty, and not of contract, and the contract is not alleged as the cause of action, and when from the facts alleged the law raises the duty by reason of the calling of the defendant, as in cases of innkeepers and common carriers, and the breach of duty is solely counted upon, the rules applying to actions *ex delicto* determine the rights of the parties." *Frink v. Potter*, 17 Ill. 412; *Wright v. Greer*, 6 Vt. 151, 27 Am. Dec. 538; *Bank v. Brown*, 3 Wend. (N. Y.) 158; *McCall v. Forsyth*, 4 Watts & S. (Pa.) 179. We conclude, therefore, that the gist of this action under the allegations of the petition is a breach of duty arising from the obligations imposed by law upon common carriers, and that it is not an action upon the contract of carriage." Under the ruling in the opinion just quoted from, the action is clearly *ex delicto*, and plaintiff was not entitled to recover on the theory that his action was for a breach of contract.

It is clear that plaintiff must recover, if at all, for a breach of defendant's duty as a common carrier of passengers, and to maintain his action it was incumbent upon him to prove that the relation of passenger and common carrier of passenger existed, and, if he has failed to prove this relation or to offer evidence from which it might be inferred, he cannot recover. The train on which plaintiff sought passage was not a regular train, and was not scheduled, but is what is commonly known as an "extra freight," and on which passengers were not generally carried. This fact was known to plaintiff before he sought passage on it. It is generally recognized that a railroad company may make and enforce reasonable rules with reference to carrying passengers on freight trains, and that it may properly exclude passengers from certain of its freight trains. Railroad companies may properly designate on what trains passengers may ride, and, generally speaking, persons seeking passage have not the right to elect for themselves what train they may ride on. *B. & M. R. Co. v. Rose*, 11 Neb. 181, 8 N. W. 433; *Chicago, B. & Q. R. Co. v. Mann* (Neb.), 111 N. W. 379; *Roberts v. Smith*, 5 Ariz. 368, 52 Pac. 1120. There can be no doubt of the propriety of railroad companies refusing to carry passengers on certain of their freight trains, and, under some circumstances, consideration of public policy would require them to refuse to carry passengers, as for instance where the trains were carrying large quantities of highly inflammable or explosive substances which

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might render the lives and limbs of passengers extremely hazardous. It was proper for the defendant to refuse to carry passengers generally on the extra freight train on which plaintiff sought passage, but he appears to contend that, because he held a freight train permit, he was entitled to ride on any of the defendant's freight trains. The permit is in the following form: "Chicago, Burlington & Quincy Ry. Co. Lines west of the Missouri River. Freight Train Permit. Conductors, Freight Trains: 1905. When presented with regular transportation this will be your authority to carry Mr. H. F. Reed, representing R. Herssel Mfg. Co. between all stations at points where your train stops for other business. This permit is subject to conditions printed on back, which must be signed in ink by the person named, but does not authorize agents to flag freight trains. Good until December 31, 1905. When countersigned by G. W. Loomis or J. Hodge. [Signed] G. W. Holdrege, General Manager. No. 2,926. [Countersigned] J. Hodge. 1905 Nontransferable. This permit is granted at the special request of and accepted by the undersigned, upon the following conditions, it being understood that greater danger attaches to riding on a freight train than on a passenger train: I hereby agree to assume all risk of accident to my person and loss or damage to my personal effects, and also to board and alight from freight trains only at points where such trains may be stopped for the convenience of the railway company. It is understood that freight trains do not as a rule start from or stop at stations with the caboose or coach at the station platform. Baggage will only be accepted for transportation, under check, on freight trains where there is room in the ordinary equipment of such trains, when baggage may be loaded or unloaded from or to platform without requiring special stop, and when passenger with proper ticket travels on same train. [Signed] H. F. Reed. (Sign in ink here.)" This permit was not issued at the time of the purchase of the mileage ticket, nor was any consideration paid for it. It could have no more efficacy than a pass issued without consideration. It was not a valid contract, but was a mere license which might be revoked by the company at any time when the holder was not actually a passenger under it. *New York & H. R. R. Co. v. Ketchum*, 27 Conn. 170; *Turner v. Richmond Ry. Co.*, 70 N. C. 1. In the instant case plaintiff was denied permission to ride upon the train before he entered it. This amounted to a revocation of the freight train permit, at least for the one passage sought. He was a mere trespasser when he entered the caboose after having been refused passage on the train, and the defendant and its employees were authorized to use such reasonable force as was necessary to eject plaintiff from the train. It is conceded that they did no more than take him by the arm or coat sleeve and lead him quietly from the train.

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Plaintiff does not contend in his evidence that he received any injury other than loss of time and humiliation of being ejected from the train. The relation of passenger and carrier of passengers did not exist at the time plaintiff was ejected from the car. Defendant did not owe to plaintiff that high duty which the law imposes upon carriers of passengers, and could not therefore be liable for a breach of that duty.

It follows that the judgment of the district court is right, and we recommend that it be affirmed.

DUFFIE, EPPERSON, and CALKINS, CC., concur.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment of the district court is affirmed.

LOBNER v. METROPOLITAN ST. RY. CO.

(Supreme Court of Kansas, April 10, 1909.)

[101 Pac. Rep. 463.]

Carriers—Overloaded Cars—Negligence.*—While it cannot be declared negligence as a matter of law for a street railway company to allow its cars to be crowded with passengers, yet if the company permits its cars to become so crowded that a passenger is pushed off and injured, the question of whether the overcrowding of the cars is negligence is one of fact for the jury.

Carriers—Crowded Street Car—Contributory Negligence.†—The mere fact that a person rides on a crowded car, or the platform of such car, on the invitation of a railway company cannot be regarded as contributory negligence per se.

Carriers—Crowded Street Cars—Duty of Carrier.*—One who rides on a crowded car assumes the inconvenience resulting from its crowded condition, but the company is not, for that reason, relieved from the responsibility of using due care for the safety of the passengers invited upon such crowded car.

Carriers—Contributory Negligence—Question for Jury.†—Whether a person who enters a car of a street railway company which is already crowded, and rides on a crowded platform, from which he is shoved off, and injured, is guilty of contributory negligence is a question to be determined by the jury under all the circumstances brought out in the evidence.

(Syllabus by the Court.)

*As to the duties and liabilities of carriers of passenger with respect to overloading conveyances, see extensive note, 4 R. R. R. 217, 27 Am. & Eng. R. Cas., N. S., 217.

†For the authorities in this series on the question whether it is contributory negligence in a passenger to board a crowded car, see foot-

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Error from Court of Common Pleas, Wyandotte County;
WILLIAM G. HOLT, Judge.

Action by Detlof Lobner against the Metropolitan Street Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

J. E. McFadden, for plaintiff in error.

Miller, Buchan & Miller, for defendant in error.

JOHNSTON, C. J. Detlof Lobner, who alleges that he was crowded off and caused to fall from a street car in Kansas City, and thereby seriously injured, brought this action against the Metropolitan Street Railway Company, which was operating the car, alleging that the injury was the result of the negligence of the company. The grounds of negligence pleaded were substantially that the street car on which he rode was overcrowded; that the company did not place gates on the cars for the protection of passengers; that it did not provide a sufficient number of cars to carry the passengers safely; that it permitted the car and its platform to become so crowded as to make the plaintiff's position on the car perilous, and that by reason of its crowded condition, and while standing on the platform, he was crowded off by his fellow passengers; and that, when the car was already crowded, the agents of the company, at a certain junction and transfer point, invited and permitted other passengers to come on the car so as to imperil plaintiff, when they knew, or should have known, that the overcrowding of the car would cause the plaintiff to be crowded off and injured. The plaintiff gave testimony in his own behalf to the effect that he boarded one of the defendant's cars to ride to his work, and found all of the seats occupied, with passengers standing in the aisle, and on both front and rear platforms or vestibules; that after the car had proceeded a few blocks to Central avenue, a junction point, some persons left the car, and many other persons got on; that at that time he moved from the aisle of the car where he was standing to the front vestibule, in order that he might get through the crowd more easily when he left the car at his destination; that while standing in the vestibule, holding to a rod on the side of the car with his left hand, with a dinner bucket in his right hand,

note of *Boesen v. Omaha St. Ry. Co. (Neb.)*, 24 R. R. R. 628, 47 Am. & Eng. R. Cas., N. S., 628.

For the authorities in this series on the question whether it is contributory negligence in a passenger to ride on the platform of a street car, see foot-note of *Mittleman v. Philadelphia Rapid Transit Co. (Pa.)*, 30 R. R. R. 659, 53 Am. & Eng. R. Cas., N. S., 659; foot-note of *Chicago Great Western Ry. Co. v. Mohaupt (C. C. A.)*, 30 R. R. R. 364, 53 Am. & Eng. R. Cas., N. S., 634; last foot-note of *Miller v. Chicago, etc., R. Co. (Wis.)*, 29 R. R. R. 623, 52 Am. & Eng. R. Cas., N. S., 623; foot-note of *Southern Ry. Co. v. Strickland (Ga.)*, 29 R. R. R. 326, 52 Am. & Eng. R. Cas., N. S., 326.

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he was crowded out of the car and injured. He testified that he was shoved off by the pressure of the crowd against his back, but did not observe the person who was immediately against him. The conductor came into the front vestibule to collect fares just before the plaintiff was pushed off, and he says there were about 10 or 12 persons, and perhaps more, standing in the front vestibule when he was crowded out of the car. There were no gates inclosing the vestibule or platforms of the car. After additional testimony showing the extent of his injuries, the defendant introduced a demurrer to the plaintiff's testimony, which was sustained, and of this ruling plaintiff complains.

There is abundant evidence that the car on which the plaintiff was carried was overcrowded, and there is testimony tending to show that, by reason of the overcrowding of the car, the plaintiff was pushed from it and injured. It is the duty of the railway company to exercise the utmost care for the safety of passengers that the means of conveyance and the circumstances of the case will permit. The company controls the operation of its cars and the number of passengers permitted to ride on each of them. It was the duty of the company to provide a sufficient number of cars to accommodate and properly care for passengers; and to permit its cars to become overcrowded so that a passenger is exposed to a danger which reasonable foresight might have anticipated and avoided is negligence. *Topeka City Ry. Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667, 5 Am. St. Rep. 754. In *Pray v. Omaha Street R. Co.*, 44 Neb. 167, 62 N. W. 447, 48 Am. St. Rep. 717, it was held that: "It is evidence of negligence on the part of the street railway company to carry passengers greatly in excess of the seating capacity of its trains, and permitting them to stand on the platforms and steps of the cars." See, also, *Reem v. St. Paul City Ry. Co.*, 77 Minn. 503, 80 N. W. 638, 778; *Sheridan v. Brooklyn & Newtown R. R.*, 36 N. Y. 39, 93 Am. Dec. 490; *Merwin v. Manhattan Railway Co.*, 48 Hun, 608, 1 N. Y. Supp. 267; *Lehr v. S. & H. P. R. R. Co.*, 118 N. Y. 556, 23 N. E. 889; *Graham v. McNeill*, 20 Wash. 466, 55 Pac. 631, 43 L. R. A. 300, 72 Am. St. Rep. 121; *Neslie and Wife v. Passenger Railway*, 113 Pa. 300, 6 Atl. 72; *Lynn v. Southern Pacific Railway Co.*, 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710; *Nellis on Street Railroad Accident Law*, p. 121.

The overcrowding of the car in this case is not held to be culpable negligence as a matter of law, but only that there is testimony tending to show negligence which is deemed sufficient to take the case to the jury. It is contended by the defendant, however, that the plaintiff by his own testimony discloses that he voluntarily exposed himself to danger by riding on the platform of a crowded car, a danger which he had the best opportunity to discover and appreciate. It is not contributory negligence *per se* to ride on a crowded car or the platform of such a car. The practice of inviting and permitting passengers to ride

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on the platforms of street cars is so common that it cannot be held, as a matter of law, that a passenger in doing so is guilty of contributory negligence. One who rides on a crowded car assumes the inconvenience resulting from its crowded condition, but the company is not, for that reason, relieved from responsibility of using due care for the safety of the passengers invited upon the car. Of course, a passenger may take such an obviously dangerous position on a car that he will be held to have assumed the hazard of so doing but the question of whether the plaintiff was negligent in the position which he took, and was occupying when he was crowded off the car, was fairly one for the determination of the jury. In *Topeka City Ry. Co. v. Higgs, supra*, it was said: "A street railway company has the right to carry passengers on the platforms; and, if a passenger be injured while standing there, without objection by the company's agent, whether the injury, was with his contributory negligence is for the jury to decide, under all the facts and circumstances detailed in the evidence." In *Ward v. Chicago, Milwaukee & St. Paul R. Co.*, 102 Wis. 215, 78 N. W. 442, it was held that: "Where a passenger on boarding a train finds the cars crowded, whether he is guilty of negligence in standing on the platform is a question for the jury." The Supreme Court of Missouri held that it is not negligence *per se* for a passenger to ride on the platform of a street car, and that this is true whether there is or is not room inside the car. The question of whether one injured while standing on the platform is guilty of contributory negligence is for the jury, and not for the court. *Seymour v. Citizens' Ry. Co.*, 114 Mo. 266, 21 S. W. 739. In *Lynn v. Southern Pacific Railway Co.*, *supra*, the question of whether a passenger was justified in entering on a crowded train was under consideration, and the court held that, since he was accepted as a passenger, he was entitled to the same care and consideration as other passengers at the hands of the railroad company. "The fact that he was compelled to stand upon the platform, and was thus more unfortunate and more inconvenienced than his friends who were able to crowd within the car, was wholly immaterial. Their legal rights were the same. The duties and obligations of the defendant to them were the same." See, also, *Nolan v. Brooklyn City, etc., R. Co.*, 87 N. Y. 63, 41 Am. Rep. 345; *GINNA v. Railroad Co.*, 67 N. Y. 596; *Graham v. McNeill, supra*; *Pray v. Omaha Street R. Co.*, *supra*; *Trumbull v. Erickson*, 97 Fed. 891, 38 C. C. A. 536; *Nellis on Street Railroad Accident Law*, p. 128.

On demurrer the plaintiff's evidence is accepted as true, and reasonable inferences most favorable to the plaintiff must be drawn in his favor; and, so considered, there was certainly sufficient testimony to take the case to the jury.

The judgment of the trial court must therefore be reversed, and the case remanded for a new trial. All the Justices concurring.

EAST v. BROOKLYN HEIGHTS R. Co.

(Court of Appeals of New York, June 1, 1909.)

[88 N. E. Rep. 751.]

Statutes—Construction—Doubtful Meaning.—If there is any doubt as to the proper construction of a statute, it should not be construed so as to lead to unreasonable or absurd consequences.

Statutes—Construction—Penal Statutes.—A statute, penal in nature, should not be construed to be applicable to an act otherwise innocent and natural and of common occurrence, unless such a legislative intent is clear and unmistakable.

Carriers—Boarding Moving Cars—Construction of Statute.—Pen. Code, § 426, subd. 2, making it a misdemeanor for a person to get on any car or train while in motion, to obtain transportation thereon as a passenger, applies to a person seeking to board a car or train unauthorizedly, or intending to obtain transportation as a passenger surreptitiously, and not to one who steps on a car while in motion, in good faith, intending to become a passenger thereon, and comply with the carrier's rules.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by John P. East against the Brooklyn Heights Railroad Company. From a judgment of the Appellate Division (126 App. Div. 936, 110 N. Y. Supp. 1127), affirming a judgment of dismissal and an order denying a new trial, plaintiff appeals. Reversed, and new trial ordered.

This action was brought to recover damages of the defendant for the false arrest and for the malicious prosecution of the plaintiff. Upon the trial it appeared by the testimony of the plaintiff, a lawyer, that he was intending to return from Coney Island upon one of the defendant's trains. The train had already started from the station, and was proceeding slowly, at about the speed of a person walking. The plaintiff hurried his gait, and boarded one of the cars by stepping upon the lower step of the platform. The platform gate was closed, but the guard opened it and allowed him to enter. The guard then called a special officer, employed by the defendant, who arrested the plaintiff for getting on the train while in motion. The train was stopped, the officer and the plaintiff descended from it, and the latter, being taken to a station house, was there detained by a police sergeant under a charge of "disorderly conduct in getting on a moving car." The plaintiff subsequently procured his release under bail, and on the following day, after examination before the magistrate, was discharged. Upon this, and other

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evidence bearing upon the arrest, the trial court, upon the motion of defendant's counsel, dismissed the complaint, and denied the request of the plaintiff to go to the jury, to which ruling the plaintiff excepted. Upon appeal to the Appellate Division, in the Second Department, the judgment of the Trial Term, and an order denying a motion for a new trial were affirmed.

Louis Marshall and Samuel H. Evins, for appellant.
D. A. Marsh and George D. Yeomans, for respondent.

GRAY, J. (after stating the facts as above). There is no ground upon which the dismissal of the plaintiff's complaint could be justified, unless his arrest was authorized by the statute. If he, in boarding the train while in motion, had committed an act which the law, as declared by some statute of the state, had made a punishable offense, then his arrest was justified, and his cause of action failed. If that act, however, was not prohibited by law, then he was entitled to maintain his action, and to have the issue determined by the jury. The defendant claims that section 426 of the Penal Code made the act of the plaintiff a misdemeanor. That section has for a caption "Riding on Freight Trains." The first subdivision of the section reads: "A person who (1) rides on any engine or any freight or wood car of any railway company, without authority or permission of the proper officers of the company, or the person in charge of said car or engine; or (2) who gets on any car or train while in motion, for the purpose of obtaining transportation thereon as a passenger; or (3) who willfully obstructs, hinders or delays the passage of any car lawfully running upon any steam or horse or street railway; is guilty of a misdemeanor."

It is contended that the second subdivision of this section is applicable to the plaintiff's conduct. If this contention is correct, then an act of such common occurrence as to be almost a characteristic trait of our human nature, without distinction of class or calling, is stamped with criminality. There is probably not an hour of the day when the statute is not offended against by persons in boarding cars while in motion, if it has the meaning contended for. That the Legislature ever intended such an application of its enactment I do not believe. If there is any doubt as to the proper construction of the statute, then it should receive that which would not lead to unreasonable, if not absurd, consequences. Being penal in its nature, it should not be construed to be applicable to an act, otherwise innocent and natural, and of common occurrence, unless such a legislative intent is clear and unmistakable. If it be conceded that the general language, in which the legislative purpose is expressed, upon its face raises a doubt as to what was intended, that doubt should be resolved in favor of a construction which will accord with a just motion of what was to be forbidden. I think that it is resolved by a con-

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sideration of the legislation which preceded, and apparently led to, the enactment. If it be true that, when regarded in the light of the classification of the section, of its possible origin, and of the peculiar wording of the law, the legislative intent is equivocal, we should not hesitate to restrict it so as to negative an application which would make that unlawful which, in the common belief, is natural and innocent.

The first enactment by the Legislature upon the general subject is to be found in chapter 261, p. 331, Laws 1878. That statute made it a misdemeanor for any person to "get on or off a freight car or engine while in motion," or to "ride on any wood or freight car, unless employed by or with permission from the proper officers of such railroad, or the person in charge of such car or engine." Subdivision 1 of section 426 of the Penal Code is plainly a codification of that enactment. By chapter 474, p. 520, Laws 1879, it was made a misdemeanor for any person to "obstruct, hinder, or delay the passage or running of any car lawfully running upon any horse or street railroad." Subdivision 3 of section 426 of the Penal Code is quite as plainly a codification of that statute. By chapter 370, p. 551, Laws 1880, it was made a misdemeanor for a "minor or other person, not a passenger" to climb, stand upon, or in any way to attach himself to, a locomotive or car, unless it is done in compliance with law, or by permission, under the lawful rules and regulations of the railroad. The same chapter made it also a misdemeanor to "invite, or solicit any such minor or other person" to come, or to be, or to consent to his remaining upon, any engine, or any freight or baggage car, unless rightfully there by law, or with permission under the rules and regulations of the corporation. Thus these three statutes had for their object the prevention of the unauthorized riding or being upon cars or engines, and of the obstruction or delaying of cars upon surface railroads. In the following year, when the Penal Code was established (chapter 676, p. 913, Laws 1881), section 426 was enacted as it stands at present, with the exception that, by an amendment in 1890 (chapter 458, p. 824, Laws 1890), subdivision 3 was made to apply to steam railways, as well as to horse and street railways, and the caption "Riding on Freight Trains" was added. It is reasonable to infer that the Penal Code, in the respect which we are now considering, was intended as a codification of, and to resume within its provisions, existing laws. If subdivision 2 of the section, in its precise terms, is not found in any pre-existing statute, from its situation it is fair to suppose that it was intended to be supplemental to legislation, having for its object such unlawful acts as the getting or being upon a car or train unauthorizedly. The caption of the section is certainly not appropriate to all of its subdivisions; but it is probable, if the Legislature had intended to change and to add to the law with the view of preventing accidents, by making

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the common practice of getting on a car or train, while in motion, a misdemeanor, that it would have embodied that intention in a section, whose apparent source was in statutes for the prevention of unauthorized riding upon, or the obstruction of the passage of, a car? Had the Legislature been moved to this enactment by the occurrence of accidents to the traveling public, its purpose would have been better and more completely expressed in prohibiting persons from getting off, as well as from getting on, a car while in motion. It seems more consonant with the reason of the thing that this subdivision should have been intended to provide for the punishment of any person who sought to get on a car, or train, unauthorizedly, or intending to obtain transportation as a passenger surreptitiously. That is to say, we could find a reasonable purpose in the enactment, when reading it as a prohibition against stealing or getting a free ride, by getting and standing upon the train, or some part thereof. The practice of stealing rides upon cars or trains by boys and tramps was notorious, and its suppression had furnished adequate reason for a statute upon the subject. In my opinion we should construe this part of this section as applicable to such unauthorized and mischievous acts, and not to the innocently impulsive acts of persons intending, in good faith, to become passengers. To give it that construction makes the provision one in harmony with a policy declared in the statutes prior to the Code revision. If the construction given below to the subdivision is correct, it is certainly remarkable that, since its enactment in 1881, no case is brought to our attention in which the courts have so held.

I am not able to agree with the opinion of the Appellate Division that the enactment of subdivision 2 in section 426 was such a general and comprehensive change of the law, as to exclude a doubt of the legislative intent being to punish a person who gets on a car while in motion. I think that the language is sufficiently significant of an intent to make the prohibition apply, not to the person endeavoring to ride upon the car lawfully as one of its passengers, but to the person endeavoring to obtain transportation as a passenger by surreptitious means, and not intending to comply with the rules as to such. In giving that interpretation we reach a result more satisfactory to the mind, and one which supports a salutary legislative measure. If the Legislature intended to make of an ordinary and innocent act a penal offense, I think it should have declared that intention in a way where, by reading, or context, it would be plain.

If the plaintiff, though intending to be a passenger upon the train, was defiant of rules, or if he was disorderly and gave any justification for the treatment he received from the defendant's servants, those were matters for the consideration of the jurors upon a submission to them of the case.

There were errors committed in the exclusion of testimony

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offered by the plaintiff, which need not be referred to, inasmuch as upon the retrial which is ordered they may not recur.

For these reasons, I advise the reversal of the judgment, and that a new trial be ordered, with costs to abide the event.

VANN, WERNER, WILLARD, BARTLETT, HISCOCK, and CHASE, JJ., concur. CULLEN, C. J., absent.

Judgment reversed, etc.

ARKANSAS CENT. R. CO. v. JANSON *et al.*

(Supreme Court of Arkansas, May 24, 1909.)

[119 S. W. Rep. 648.]

Carriers—Passengers—Personal Injuries—Management of Conveyances—Freight Train.*—Passengers on a freight train caboose assume the ordinary inconveniences and risks incident to travel by that means.

Carriers—Passengers—Injuries—Care Required—Freight Train Passengers.†—While passengers on a freight train assume the ordinary inconveniences and risks incident to that means of travel, the carrier owes to such passengers the same duties and high degree of care that it owes to ordinary passengers, which means the highest practicable degree of care consistent with that mode of travel.

Carriers—Passengers—Injuries—Care Required.‡—While a common carrier is not an insurer of passengers, it must exercise the highest degree of human care and foresight for their safety.

Carriers—Passengers—Sufficiency of Means of Transportation—Track.‡—A carrier must furnish a reasonably safe track in transporting passengers and maintain it in that condition so far as it can by the exercise of the utmost human skill and foresight.

*For the authorities in this series on the subject of the duties and liabilities of carriers with respect to passengers on freight trains, see first foot-note of *St. Louis, etc., Ry. Co. v. Brabbzson* (Ark.), 30 R. R. R. 625, 53 Am. & Eng. R. Cas., N. S., 625; fourth foot-note of *Tinkle v. St. Louis & S. F. R. Co.* (Mo.), 30 R. R. R. 470, 53 Am. & Eng. R. Cas., N. S., 470.

†See second foot-note of *Barnes v. Danville St. Ry. & Elec. Co.* (Ill.), 31 R. R. R. 52, 54 Am. & Eng. R. Cas., N. S., 52; first foot-note of *Roanoke Ry. & Elec. Co. v. Sterrett* (Va.), 30 R. R. R. 611, 53 Am. & Eng. R. Cas., N. S., 611; first foot-note of *Southern Ry. Co. v. Miller* (Ky.), 30 R. R. R. 311, 53 Am. & Eng. R. Cas., N. S., 311; eighth head-note of *McLean v. Atlantic Coast Line R. Co.* (S. Car.), 30 R. R. R. 76, 53 Am. & Eng. R. Cas., N. S., 76; fifth head-note of *Birmingham Ry., etc., Co. v. Sawyer* (Ala.), 29 R. R. R. 779, 52 Am. & Eng. R. Cas., N. S., 779.

‡See second foot-note of *Staples v. Rhode Island Suburban Ry. Co.* (R. I.), 27 R. R. R. 315, 50 Am. & Eng. R. Cas., N. S., 315; third head-note of *O'Gara v. St. Louis Transit Co.* (Mo.), 27 R. R. R. 333, 50 Am. & Eng. R. Cas., N. S., 33.

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Carriers—Passengers—Equipment.§—A carrier must furnish reasonably safe equipment for passengers, and maintain it in that condition so far as it can by the exercise of the utmost human skill and foresight.

Carriers — Passengers — Injuries—Negligence—Presumption.||—A showing of injury to a passenger in the operation of a train makes out a prima facie case of negligence by the carrier, especially in case of an injury caused by a derailment.

Carriers—Passengers—Injuries—Sufficiency of Evidence—Negligence.—In an action for injuries to a passenger caused by delay after the train had been derailed, because of a broken rail, evidence held to sustain a finding of negligence by the company.

Carriers—Passengers—Injuries—Negligent Delay.||—A carrier must transport its passengers with reasonable dispatch, and is liable for damages to passengers caused by unreasonable delay, so that the carrier would be liable for injuries to the passengers caused by taking cold from being compelled to stay in the car all night after the train had been derailed by the carrier's negligence.

Appeal and Error—Findings—Conclusiveness—Findings of Court.—The finding of the trial court sitting as a jury is as conclusive on the Supreme Court as a jury finding.

Carriers—Passengers—Injuries—Sufficiency of Evidence—Amount of Damages.—In consolidated actions by passengers for injuries caused by being compelled to stay in a caboose all night, after the train had been derailed, causing some of plaintiffs to catch cold by

§See fifth foot-note of *Spiking v. Consolidated Ry. & O. Co. (Utah)*, 27 R. R. R. 457, 50 Am. & Eng. R. Cas., N. S., 457; foot-note of *Walters v. Seattle, R. & S. Ry. Co. (Wash.)*, 28 R. R. R. 185, 51 Am. & Eng. R. Cas., N. S., 185.

||See third foot-note of *Armstrong v. Portland Ry. Co. (Ore.)*, 31 R. R. R. 89, 54 Am. & Eng. R. Cas., N. S., 89; third foot-note of *Taber v. Seaboard A. L. Ry. (S. Car.)*, 31 R. R. R. 60, 54 Am. & Eng. R. Cas., N. S., 60; foot-note of *McCann v. Boston Elev. Ry. Co. (Mass.)*, 30 R. R. R. 618, 53 Am. & Eng. R. Cas., N. S., 618; foot-note of *Ginn v. Pennsylvania R. Co. (Pa.)*, 30 R. R. R. 650, 53 Am. & Eng. R. Cas., N. S., 650; first foot-note of *Brigg v. Durham Traction Co. (N. Car.)*, 30 R. R. R. 324, 53 Am. & Eng. R. Cas., N. S., 324; first foot-note of *McLean v. Atlantic Coast Line R. Co. (S. Car.)*, 30 R. R. R. 76, 53 Am. & Eng. R. Cas., N. S., 76; second foot-note of *Pere Marquette R. Co. v. Strange (Ind.)*, 30 R. R. R. 66, 53 Am. & Eng. R. Cas., N. S., 66; first foot-note of *Kansas City So. Ry. Co. v. Davis (Ark.)*, 29 R. R. R. 664, 52 Am. & Eng. R. Cas., N. S., 664; first foot-note of *Cleveland, etc., Ry. v. Hadley (Ind.)*, 29 R. R. R. 638, 52 Am. & Eng. R. Cas., N. S., 638; foot-note of *Russell v. Seattle R. & S. Ry. Co. (Wash.)*, 29 R. R. R. 321, 52 Am. & Eng. R. Cas., N. S., 321; foot-note of *Central of Georgia Ry. Co. v. Geopp (Ala.)*, 29 R. R. R. 315, 52 Am. & Eng. R. Cas., N. S., 315; second foot-note of *Cleveland, etc., Ry. Co. v. Hadley (Ind.)*, 29 R. R. R. 10, 52 Am. & Eng. R. Cas., N. S., 10; second head-note of *Paul v. Salt Lake City R. Co. (Utah)*, 30 R. R. R. 144, 53 Am. & Eng. R. Cas., N. S., 144.

¶See second foot-note of *South Covington, etc., Ry. Co. v. Quinn (Ky.)*, 30 R. R. R. 508, 53 Am. & Eng. R. Cas., N. S., 508.

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the exposure, etc., and otherwise inconveniencing them, evidence held to sustain an award of damages to two of the plaintiffs in the sums of \$200 and \$100, respectively, and \$5 each to the other two.

Appeal from Circuit Court, Franklin County; JEPHTHA H. EVANS, Judge.

Consolidated actions by J. M. Janson and others against the Arkansas Central Railroad Company. From a judgment for each of plaintiffs, defendant appeals. Affirmed.

Lovick P. Miles and *T. B. Pryor*, for appellant.

Sam R. Chew, for appellees.

FRAUENTHAL, J. The plaintiffs, J. M. Janson, Sue Janson, T. M. Baldrich, and Edna Baldrich, instituted separate suits against the defendant, Arkansas Central Railroad Company, for the recovery of damages for injuries which they alleged they sustained while passengers on one of the defendant's freight trains. The four cases were consolidated, and were tried together by the court sitting as a jury. On the 12th day of December, 1907, the plaintiffs purchased tickets from defendant at Paris, Ark., for Ft. Smith, Ark., and about 7 o'clock p. m. of that day took passage at Paris, Ark., in the caboose of one of defendant's freight trains. The train was derailed at about 9 o'clock p. m. at a point about two miles distant from Lavacca, a station on defendant's line of railroad. The train was delayed at said place by reason of the wreck from that hour until about 10 o'clock a. m. of the following day, and the plaintiffs were compelled to remain in the car during that time, after which time they were carried on to Ft. Smith. They alleged that it was a cold and rainy night, and that, by reason of being thus delayed and detained in the car during the entire night and a part of the following day, they were exposed to the elements and contracted cold, and were deprived of food, and underwent great discomfort and inconvenience, and that they suffered therefrom great physical and mental pain for a period of 10 days. They each asked for \$1,000 damages. The court rendered a verdict in favor of Edna Baldrich for \$200, in favor of Sue Janson for \$100, and in favor of T. M. Baldrich and J. M. Janson for the sum of \$5 each. And from the several judgments entered on said findings the defendant appeals to this court.

The plaintiffs J. M. Janson and Sue Janson are husband and wife and the same relationship exists between T. M. Baldrich and Edna Baldrich, and the women were sisters. The mother of T. M. Baldrich had died on that day or the night before at Ft. Smith, and they were anxious to get there before her remains should be sent to her former home in Oklahoma. They came to the depot at Paris at 4 o'clock of the afternoon of December 12th, thinking the train left at that hour for Ft. Smith, and remained

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there until 7 o'clock, when they entered defendant's train as passengers. The evidence tended to prove that at the place on defendant's line of railroad about two miles beyond Lavacca the train was derailed on account of the breaking of one of the steel rails into a number of pieces, and testimony was introduced to show that this was caused by some latent defect in the rail; and there was some testimony indicating that it might have been caused by the high rate of speed of the train or by unsound ties. The evidence tended to show that it was a cold and rainy night; that, after the derailment, the engine was detached from the cars and proceeded to Ft. Smith for assistance, and the caboose was left on the track over a creek. There were three other passengers in the caboose, all of whom were men. A fire was kept in the stove in the caboose, which at times became so heated that the door would be opened for ventilation, when the rain and cold would drive into the coach until it became unbearably cold, and then the door was again closed, and the coach would become again overheated. This continued during the entire night, and by the sudden changes in the temperature and the drafts of cold that at times blew into the coach the plaintiffs Edna Baldrich and Sue Janson contracted severe colds. The plaintiff Edna Baldrich testified that from this cause she contracted a severe cold which caused her to have fever, and the cold lasted for 10 days, giving her a great deal of pain and suffering. The plaintiff Sue Janson testified that she contracted a cold, but not as severe or painful as that of Edna Baldrich. The other plaintiffs contracted a very slight cold, if any.

There was a conflict in the testimony as to whether there was a closet on the caboose, and the plaintiffs testified that one of them asked an employee of defendant as to same, and that he was told it was not in the caboose. On this account and because the caboose was on a trestle so that they could not get off it, the women suffered a great deal of inconvenience, discomfort, and pain. The evidence also tended to prove that, on account of the heated coach, their tight dresses and corsets caused them a great deal of discomfort, and they were unable to remove these on account of the presence of the other passengers. The evidence also tended to prove that, while the plaintiffs obtained some food from that which the employees carried on the train for their personal needs, it was not sufficient, and that they suffered somewhat from hunger.

It is urged by the defendant that there is an entire lack of evidence to support the judgments in this case. The determination of this contention depends upon the duty which the defendant owed to the plaintiffs, and whether there was any negligence on its part in the performance of that duty by which the plaintiffs were injured, and, if so, the extent of that injury. In this case the railroad accepted and undertook the carriage of the plain-

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tiffs as passengers on one of its freight trains. In the passage on such trains it is generally understood that there is a greater inconvenience and risk than in the carriage on regular passenger trains; and so that plaintiffs assumed the ordinary inconveniences and risks that are incident to the travel in the caboose of a freight train. In the carriage of passengers on its freight trains "subject to that qualification the railway company becomes bound in favor of the passenger by all the obligations of a common carrier upon a regular passenger train." 3 Thompson on Negligence, § 2901. The railway company still owes to the passenger on its freight train the duty to exercise the highest practicable degree of care to protect the passenger from injury consistent with this mode of carriage; and, subject to that qualification, "owes him the same high degree of care to protect him from injury as if he were on a passenger train." *Rodgers v. C. O. & G. R. R. Co.*, 76 Ark. 520, 89 S. W. 468, 1 L. R. A. (N. S.) 1145, 113 Am. St. Rep. 102; *Pasley v. St. L., I. M. & S. Ry. Co.*, 83 Ark. 22, 102 S. W. 387; *St. L., I. M. & S. Ry. Co. v. Brabbzson*, 87 Ark. 109, 112 S. W. 222. A common carrier of passengers is not an insurer of the safety of the passenger in the sense that a carrier of goods is an absolute insurer of the goods it transports; and yet a railway company is bound to provide for the safe conveyance of its passengers as far as human care and foresight will go, no matter upon what kind of train it undertakes to carry them, subject only to the ordinary inconvenience and risk incidental to the travel on a freight train; and it is especially required "to furnish for its passengers a reasonably safe and sufficient track and equipments and to maintain them in a reasonably safe condition, so far as can be provided by the utmost human skill, diligence and foresight, and is liable to a passenger for a slight negligence causing injury." *Railway Co. v. Mitchell*, 57 Ark. 418, 21 S. W. 883; *Railway Co. v. Murray*, 55 Ark. 248, 18 S. W. 50, 16 L. R. A. 787, 29 Am. St. Rep. 32; *St. L., I. M. & S. Ry. Co. v. Richardson*, 87 Ark. 602, 113 S. W. 794; 2 Hutchinson on Carriers (3d Ed.) § 893. If an injury occurs in or growing out of the operation of its trains, a *prima facie* case of negligence is made out against the railroad company by which it becomes liable for such injury. And especially does such presumption of negligence arise where injury comes to a passenger by reason of a derailment of the train. *Barringer v. St. L., I. M. & S. Ry. Co.*, 73 Ark. 548, 85 S. W. 94, 87 S. W. 814, and numerous cases there cited; *St. L., I. M. & S. Ry. Co. v. Sandiage*, 85 Ark. 589, 109 S. W. 551. In this case the court found that the presumption of negligence that arose by reason of the derailment of the train was not overcome by the testimony herein adduced, and we cannot say that such finding is not correct. Here the plaintiffs were detained or delayed upon the passage after it had commenced, and this was caused by the derail-

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ment of the train, and therefore by the above finding it was occasioned by the negligence of the defendant. One of the obligations assumed by the carrier is to carry its passengers with reasonable dispatch, and it is liable for an injury to the passenger caused by unreasonable delay occasioned by its negligence. 2 Hutchinson on Carriers (3d Ed.) § 1109, 6 Cyc. 587. In the case of *Weed v. Panama Railroad Co.*, 17 N. Y. 362, 72 Am. Dec. 474, the plaintiff and his wife were passengers on defendant's train which was negligently stopped on its route during a stormy night, and they were compelled to remain on the train during the entire night exposed to some extent to the cold and inclemency of the weather. From this exposure the plaintiff's wife experienced great suffering, and from its effects she was taken sick. And in that case the court held that whether the act of stopping the train was caused willfully or negligently the carrier was liable for damages for the injury thus suffered. See, also, *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333. In the case at bar, while it is true that the plaintiffs assumed all the inconvenience and risks that ordinarily attach to a passenger taken on a freight train, nevertheless they did not assume any injury that might be incurred by them through an unreasonable detention upon the route on a cold and stormy night, and which detention was occasioned by the negligence of the defendant. For an injury to plaintiffs under these circumstances the defendant is liable.

The extent of the injury suffered by the plaintiffs in this case is a question of fact, as to which the court sitting as a jury has made a finding. It found that the two women suffered physical pain from the cold contracted on account of the sudden changes in the temperature of the caboose from extreme heat to extreme cold, and that Mrs. Baldrich suffered especially on this account, and that the cold and fever which she continued to suffer from for 10 days thereafter was directly attributable to this cause. More especially does this appear true when we consider that they were greatly exhausted physically by remaining in this caboose during an entire night, and that their exhausted physical condition made them more susceptible to receiving injury from the exposure on this cold and stormy night. It was justified in finding also that these women suffered physical pain on account of the discomforts they underwent by reason of their enforced position during an entire night in this caboose in which were strange men as passengers. The lower court heard the testimony, and before him these plaintiffs appeared as witnesses. He named the amount of the damages which he found would be a reasonable compensation to them for the extent of the injury which he found the evidence showed that they suffered. To the men he gave nominal damages, and to the women substantial damages. The finding of the circuit court sitting as a jury is as conclusive

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on this court as the verdict of a jury. *Bell v. Welch*, 38 Ark. 139; *Garland Co. v. Hot Springs Co.*, 68 Ark. 83, 56 S. W. 636. We are of opinion that the evidence is sufficient to support the finding of the lower court in each of these cases. The declarations of law made by the court are in harmony with the principles governing the facts and circumstances of this case; and in their brief counsel for appellant have urged no error as to these declarations.

Finding no error, the judgments are affirmed.

TOMPKINS v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, Feb. 25, 1909.)

[87 N. E. Rep. 488.]

Carriers—Rules—Reasonableness.*—A rule, promulgated by a carrier, that persons riding on the platforms of street cars do so at their own risk, is reasonable and valid.

Carriers—Passengers—Relation.—A street car passenger, riding on the front vestibule, does not, by stepping off the car to enable some ladies to alight, cease to be a passenger.

Carriers—Injury to Passenger—Assumption of Risk—Rules of Carrier.—One who boards a crowded street car, knowing of a rule of the carrier that persons riding on the platforms do so "at their own risk," must be held to assume the risk of injury resulting from his attempting to again board the car after leaving it to enable others to alight, though the carrier's servants were negligent in starting the car.

Carriers—Passengers—Insurer of Safety.†—A carrier is not an insurer of the safety of its passengers.

Report from Superior Court, Suffolk County; ROBERT O. HARRIS, Judge.

Action for personal injuries by Henry Tompkins against the Boston Elevated Railway Company. On report. Judgment ordered for defendant.

Jas. P. Magenis, for plaintiff.

R. A. Stewart and Henry J. Hart, for defendant.

RUGG, J. The plaintiff became a passenger upon a surface electric car of the defendant so crowded with passengers that he

*See last foot-note of *Birmingham, etc., Co. v. Yielding* (Ala.), 30 R. R. R. 285, 53 Am. & Eng. R. Cas., N. S., 285; first head-note of *Olson v. Northern Pac. Ry. Co.* (Wash.), 29 R. R. R. 705, 52 Am. & Eng. R. Cas., N. S., 705; foot-note of *Birmingham, etc., Co. v. Stallings* (Ala.), 29 R. R. R. 319, 52 Am. & Eng. R. Cas., N. S., 319.

†See second foot-note of preceding case.

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could not sit or stand inside, and took his place in the front vestibule. He knew of the rule of the defendant, printed on the car, that "persons riding on the platforms do so at their own risk." Before his journey's end the plaintiff stepped off the car in order to enable some ladies to alight, and as he was trying to get on again he was injured by the sudden starting of the car. The rule referred to was a reasonable one and within the power of the defendant to make. *Burns v. Boston Elevated Ry. Co.*, 183 Mass. 96, 66 N. E. 418; *Montgomery v. Buffalo Railway Co.*, 165 N. Y. 139, 58 N. E. 770. The plaintiff by voluntarily becoming a passenger upon a car so crowded that he could not get inside took the risks incident to transportation under these circumstances. One of these was that of temporarily alighting for the purpose of permitting other passengers to get off the car conveniently. *Jacobs v. Boston Elevated Railway Co.*, 178 Mass. 116, 59 N. E. 639. It has been argued by the plaintiff that his relation as passenger thereby ended. If this should be held, then it did not become re-established, for there was no evidence from which it could be found that the plaintiff gave any notice of such intention on his part to those in charge of the car or that they knew of any such intention or effort on his part to that end or that they accepted him as a passenger. *Hogner v. Boston Elevated Railway Co.*, 198 Mass. 260, 84 N. E. 464, 15 L. R. A. (N. S.) 960. But the plaintiff did not cease to be a passenger by leaving the car momentarily for this cause. He could not have been required to pay a new fare. The necessity or courtesy which prompted his action did not terminate his status as passenger. It is notorious that this is one of the common incidents of travel during rush hours. The acceptance of passengers upon cars, so crowded already, created an implication on the part of the defendant that, although some passengers might be obliged for an instant to step to the street for the accommodation of their fellows, the contract for carriage should not be thereby terminated. The plaintiff by taking his position on the front platform of such a car also impliedly contracted with reference to the same obligation resting on him. But he contracted subject to the rule of the defendant that he took all risks from riding on the front platform. One of these risks under the known conditions was that he might for a moment step off the car and get on again. Under the terms of his contract of carriage he took upon himself the consequences of injury ensuing from this act. Riding "at his own risk" could mean nothing less than at the risk of dangers resulting from the negligence of the defendant or its servants. The defendant was in any event, apart from the rule, responsible for no other risks than those arising from its own failure or that of its agents to exercise the highest degree of care as to passengers consistent with the reasonable conduct of its business. It was not an insurer of the safety of its pas-

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sengers. Hence in order to give any effect to the rule which under the circumstances became a term of the contract between the plaintiff and defendant, it must be held to exonerate the latter from all injuries which the plaintiff might receive while a passenger upon the front platform. A verdict should therefore have been ordered for the defendant. *Hosmer v. Old Colony Railroad Co.*, 156 Mass. 506, 31 N. E. 652; *McDonough v. Boston Elevated Ry. Co.*, 191 Mass. 509, 78 N. E. 141; *Pike v. Boston Elevated Ry. Co.*, 192 Mass. 426, 78 N. E. 497.

In accordance with the terms of the report the entry must be: Judgment for the defendant.

PARRENT v. RHODE ISLAND CO.

(Supreme Court of Rhode Island, May 24, 1909.)

[72 Atl. Rep. 865.]

Carriers—Carriage of Passengers—Personal Injuries—Actions—Presumptions.*—A collision between cars, causing injuries to a passenger, casts upon the carrier the burden of showing that the accident was not due to its negligence.

Exceptions from Superior Court, Providence and Bristol Counties; WILLARD B. TANNER, Judge.

Action by George Parrent against the Rhode Island Company. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

Albert B. Crafts and Thomas F. Farrell, for plaintiff.

Joseph C. Sweeney and Alonzo R. Williams, for defendant.

PER CURIAM. The fact that a car of the defendant collided with another of its cars and injured the plaintiff's wife, who was a passenger therein, cast upon the defendant the burden of explaining that the accident was not the result of the negligence of its servants who were in control of the colliding car. As the jury found for the plaintiff, and as their verdict, after the damages had been reduced by remittitur in compliance with the order of the superior court, has been approved by the justice of said court who presided at the trial, it is manifest that the judge and jury did not consider that the burden of explanation was maintained by the defendant at the trial. The case was one peculiarly appropriate for trial by jury, and comes within the general rule expressed in *Wilcox v. R. I. Co.*, 29 R. I. 292, 70

*See fourth foot-note of the second preceding case.

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Atl. 913. We do not regard the damages, so reduced, as being clearly excessive.

The defendant's exceptions are overruled, and the case is remitted to the superior court, with direction to enter judgment on the verdict.

CAMPBELL v. DULUTH & N. E. R. Co.

(Supreme Court of Minnesota, March 19, 1909.)

[120 N. W. Rep. 375.]

Negligence—Care Required.—The general standard of care fixed by the law is commensurate care, or due care under the circumstances.

Carriers—Carriage of Passengers—Care Required.*—A railroad as a common carrier is required to exercise the highest degree of care, skill, and foresight for the safety of passengers consistent with the practical operation of its road.

Carriers—Carriage of Passengers—Care Required.—The standard of care has due regard to the circumstances; that is to say, "in reference to each particular the highest degree of care which can be exercised in that particular, with reasonable regard to the nature of the undertaking and the requirement of the business in all other respects, must be exercised."

Carriers—Carriage of Passengers—Freight or Mixed Train—Care Required.†—A common carrier of passengers on a freight or mixed train is required to exercise the highest degree of care consistent with the practical operation of such a train.

Carriers—Carriage of Passengers—Logging Road—Care Required.—A carrier having limited fitness and capacity to transport passengers, and whose primary business is to transport its logs, is not held to the standard of perfection of an ideal road, but must exercise the highest degree of care practicable under the circumstances.

Carriers—Carriage of Passengers—Actions for Injuries—Evidence—Admissibility.‡—Evidence of care customary among well constructed and operated roads of the same class is admissible to show diligence, in an action brought by a passenger injured while riding in a freight train of a logging road.

Carriers—Carriage of Passengers—Actions for Injuries—Questions for Jury.—In this case it is held that whether defendant was a general

*See second foot-note of the second preceding case.

†See first foot-note of the third preceding case.

‡See last foot-note of *Bandekow v. Chicago, etc., Ry. Co.* (Wis.), 31 R. R. R. 159, 54 Am. & Eng. R. Cas., N. S., 159; second foot-note of *Tinkle v. St. Louis & S. E. R. Co.* (Mo.), 30 R. R. R. 470, 53 Am. & Eng. R. Cas., N. S., 470; extensive note, 18 R. R. R. 296, 41 Am. & Eng. R. Cas., N. S., 296.

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commercial railroad or a logging road was a question of fact for the jury.

(Syllabus by the Court.)

Appeal from District Court, St. Louis County; J. D. ENSIGN, Judge.

Action by Alice Campbell against the Duluth & Northeastern Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

H. Oldenburg and Davis & Hollister, for appellant.

Jno. Jenswold, Jr., for respondent.

JAGGARD, J. Plaintiff was injured while riding as a passenger in the caboose of the defendant's mixed train. She had a verdict. The first controversy in this appeal is whether the record contains any evidence tending to show that defendant was a so-called logging road, as distinguished from the ordinary commercial carriers. The question is not clear, because the controversy does not appear to have been satisfactorily litigated. Counsel for plaintiff himself, however, in his own questioning on trial, assumed that defendant was a logging road. In his brief on this appeal he asks: "Is it for this court to license the use of such tracks [as defendant's] when owned or operated by the company primarily for the purpose of carrying its lumber? Is a passenger on such a road to assume risks which he would not on other roads?" We have concluded that the record discloses enough to have made this a question of fact, to be tried by the jury.

The question then arises whether the court was in error in giving a charge which defined the duty of the defendant in the carriage of plaintiff to be that of the ordinary commercial carrier of passengers—"to exercise the highest degree of care, skill, and foresight for the safety of plaintiff which was consistent with the practical operation of its means of transportation." More specifically, the court charged that: "In the carriage of the plaintiff, she assumed such sudden jars and jolts as are common and unavoidable in the starting or running of mixed trains; but she did not assume any risk growing out of any negligence resulting from *the unevenness of the track* or the failure to connect the air brakes on the entire train, nor did she assume the risk of injury by the negligence of want of care of the train crew in charge of the train, nor did she assume the risk of being injured by the breaking of the train in question." (The italics are ours.) The court charged, however, that when a passenger takes passage on a freight or mixed train he assumes all risk reasonably or necessarily incident to being carried by a method which he voluntarily chooses. It denies defendant's elaborate requests to charge, which, while not all verbally accurate or correct, were

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sufficient to direct the attention of the court before the jury retired to the question whether defendant was to be held to the standard of care by which the negligence of an ordinary commercial carrier of passengers is held.

It is clear on general principles, and it is the law in this state, that the test of care is not whether in degree it should be slight, ordinary, or extreme care, but commensurate care, due care under the circumstances. The adoption of this standard would logically result in the abolition of degrees of negligence. In a measure this has followed. With respect to carriers, however, the traditional standard appears to have survived. In case of ordinary railroad affording regular passenger service, soliciting such traffic, holding themselves out as able to take care of it, and running through passenger trains of great weight at tremendous speed, commensurate care is regarded as supreme or the highest practical care. The standard care, however, has proper regard to the circumstances; that is to say, "in reference to every particular, the highest degree of care which can be exercised in that particular, with a reasonable regard to the nature of the undertaking and the requirement of the business in all other respects," must be exercised. *Dodge v. Boston Ry. Co.*, 148 Mass. 207, 218, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541.

It is not accurate to say, as is often said, that certain classes of cases involve a relaxation in the degree of care exacted, or that they constitute exceptions to the general rule requiring supreme care. The degree of care is the same. Certain circumstances are recognized as differentiating the result of its exercise; that is, there are particular situations in which commensurate care does not require of certain carrier service the same tracks, equipment, and operation as is exacted of main trunk lines operating exclusively passenger trains. Thus a passenger on a freight or mixed train "assumes all risks reasonably and necessarily incident to being carried by the method which he voluntarily chooses. What the law does require is everything necessary to the security of passengers consistent with the business of the carrier and the means of conveyance employed; the highest degree of care consistent with the practical operation of such train." *Mitchell, J.*, in *Oviatt v. D. C. Ry. Co.*, 43 Minn. 300, 303, 45 N. W. 436. And see *Rosenbaum v. St. P. & D. Ry. Co.*, 38 Minn. 173, 36 N. W. 447, 8 Am. St. Rep. 653; *Schilling v. W. & St. P. Ry. Co.*, 66 Minn. 252, 68 N. W. 1083; *Simonds v. M. & St. L. Ry. Co.*, 87 Minn. 408, 92 N. W. 409; *C. & A. R. R. Co. v. Arnol*, 144 Ill. 261, 270, 33 N. E. 204, 19 L. R. A. 313; *Railway Company v. Sweet*, 57 Ark. 287, 21 S. W. 587; *Hall v. Murdock*, 114 Mich. 233, 72 N. W. 150 (freight elevator). The trial court recognized this particular rule, but refused to apply the underlying principle to defendant's track.

The same principle also requires that the care to be exercised

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by carriers of passengers should have due reference to the nature of the road operated, the extent of its passenger traffic, its capacity and fitness to transport passengers, and to like considerations. Thus a person who, while a passenger on a train running upon a branch line of a railroad about 10 miles in length, and consisting of freight cars and a combination car in which he is riding, one part of which is designed for passengers and another part for baggage, is injured by such jerking and jolting of the car as is ordinarily incident to a train of this kind, and who is familiar with the nature of the business on this line and the manner of conducting it, cannot maintain an action against the railroad corporation for his injury. *Olds v. New York Ry. Co.*, 172 Mass. 73, 51 N. E. 450. In *I. & G. N. Ry. Co. v. Copeland*, 60 Tex. 325, 330, it was said: "The liability of a company for negligence will, to a degree, be limited by its capacity and fitness to transport passengers, known to a passenger when he elects to be transported on it. Hence a short line road, doing business and running only mixed trains, is not required to apply all the delicate checks and guards that are in use." "Treating of the subject of the use of certain engines and machinery on short roads like the one under consideration, with comparatively a small amount of business, Mr. Wharton says: 'If I employ a carrier of small means and machinery, knowing what his capacity is, I must take him as I find him. * * * A railroad, doing a small business, in a sparsely populated territory, and running only a few trains, is not required to apply all the delicate checks and guards that are in use. * * * Diligence in all these cases is not the perfection of the ideal road. It is the practical adequacy of the actual road for the particular duty it undertakes.' Wharton on Neg. § 140." And see *Shoemaker v. Kingsbury*, 3 Wall. 369, 20 L. Ed. 432 (construction train); *Wade v. Lumber Co.*, 74 Fed. 517, 20 C. C. A. 515, 33 L. R. A. 255 (in which a logging road was held to have been a private carrier).

The rule applicable to so-called logging roads, in the nature of things, depends largely upon the circumstances of each case. Ordinarily, logging roads in this state are subject to the jurisdiction of the Railroad and Warehouse Commission. Their exact legal status does not, however, determine the criterion of the care which they are required to exercise. There are many such roads, whose business is primarily the carrying of the company's own logs. It is urged, however, that the profitable business of an ordinary commercial railroad is to carry freight. None the less the distinction between the two classes of roads, so far as exercising care is concerned, is obvious and founded in nature. Logging roads carry in a caboose, or even in a passenger coach, their employees and the necessarily limited population of the territory through which they run. Their passenger business is small.

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Many persons are carried gratuitously. Such roads do not especially solicit passengers, nor do they prepare train schedules, or provide conventional passenger equipment. Usual arrangements for the conveyance or convenience of passengers are generally absent. They do not ordinarily run through passenger trains, nor any trains with great speed, nor do they usually provide convenient way stations. Indeed, they often have not even terminal stations. The equipment bears no resemblance to that of a through trunk line. Their tracks are not intended for rapid transportation, are more or less temporary in structure, and in this country often pass over bogs which can be used only in the winter season, when the cold makes the roadbed solid. They are generally inferior in construction, irregular in course, heavy in grades, and sharp as to curves. If the rule of law as to care to be exercised by common carriers of passengers were inflexible, and such logging roads were to be required to furnish the same tracks, trains, and equipment generally as are commercial roads, the result would be the judicial prohibition of enterprises of their nature. All that is required of such roads is the exercise of the highest care under the circumstances. The passenger must take such roads as he finds them. A carrier having limited fitness and capacity to transport passengers, and whose primary business is to transport its logs, is not held to the standard of perfection of an ideal road, but must exercise the highest degree of care practicable under the circumstances. The authorities involving the application of principles of facts most nearly similar tend, although not very clearly, to support this conclusion. *Boisen v. Cobbs & Mitchell*, 147 Mich. 429, 111 N. W. 82; *Demko v. Carbon Hill Co.*, 136 Fed. 162, 69 C. C. A. 74; *Williams v. Northern Lumber Co. (C. C.)*, 113 Fed. 382; *Harvey v. Deep River Logging Co.*, 49 Or. 583, 90 Pac. 501, 12 L. R. A. 131.

It follows that a new trial must be granted. In this view it is unnecessary to anticipate the course of that trial by a discussion of the other points raised, beyond saying that the defendant should have called to the attention of the trial court before the jury retired any improprieties in the charge of the court as to the extent to which a wife could recover for her deceased capacity to labor, and that evidence of customary care among well-equipped, well-operated roads of the same general character was admissible.

Reversed, and new trial ordered.

GOMM v. OREGON R. & NAVIGATION CO.

(Supreme Court of Washington, April 28, 1909.)

[101 Pac. Rep. 361.]

Carriers—Passenger's Baggage—Limitation of Liability—Contract.*

—A carrier's contract as to the passenger's baggage is not determined alone by the conditions in the ticket, but also by the circumstances of each case.

Carriers—Baggage—Contract—Public Policy.†—Contracts limiting a carrier's liability for baggage are to be construed in the light of public policy.

Carriers—Baggage—Connecting Carriers—Through Transportation.

—A through ticket over the lines of connecting carriers entitles the passenger to have his baggage checked through to his destination.

Carriers—Baggage—Connecting Carriers—Limitation of Liability.‡

—Defendant railroad sold plaintiff a through continuous ticket over its own and lines of connecting carriers and return, checking her baggage through to its destination. On starting on the return, the first carrier in checking her baggage gave her a check good on its own line only, and, plaintiff's attention not being called thereto, her baggage was lost. Held that, notwithstanding a limitation of liability to loss on defendant's road only contained in the ticket, defendant was liable for the baggage under its contract of carriage.

Carriers—Loss of Baggage—Limitation of Liability—Value.†

—A condition in an excursion ticket sold at a reduced rate, limiting the carrier's liability for loss of baggage to \$100, was valid.

Appeal from Superior Court, Spokane County; MILES POIN-DEXTER, Judge.

Action by Emily A. Gomm against the Oregon Railroad & Navigation Company for the loss of baggage. From a judgment for plaintiff, defendant appeals. Affirmed.

W. W. Cotton, W. A. Robbins, and Samuel R. Stern, for appellant.

O. J. Saville and P. C. Shine, for respondent.

CHADWICK, J. On June 21, 1907, the plaintiff purchased from the Oregon Railroad & Navigation Company at Spokane, Wash.,

*See first foot-note of *French v. Merchants' & Miners' Transp. Co.* (Mass.), 30 R. R. R. 608, 53 Am. & Eng. R. Cas., N. S., 608; last foot-note of *Shelton v. Erie R. Co.* (N. J.), 25 R. R. R. 70, 48 Am. & Eng. R. Cas., N. S., 70.

†See second foot-note of *French v. Merchants' & Miners' Transp. Co.* (Mass.), 30 R. R. R. 608, 53 Am. & Eng. R. Cas., N. S., 608.

‡See foot-notes of *Little Rock, etc., Co. v. Records* (Ark.), 16 R. R. R. 664, 39 Am. & Eng. R. Cas., N. S., 664.

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an excursion ticket at a price less than the usual fare, entitling her to transportation with a reasonable amount of baggage over the lines of the Oregon Railroad & Navigation Company from Spokane, Wash., to Portland, Or., and from Portland, Or., to Albany, Or., over the lines of the Southern Pacific Company, and from thence over the line of the Corvallis & Eastern Railroad Company to Newport, Or., and return over the same lines. The contract part of the ticket was as follows: "In issuing and selling this ticket for passage over other transportation lines the Oregon Railroad and Navigation Company acts only as agent for such lines, assumes no responsibility beyond its own line, and assumes no liability either for itself or for the lines represented on this ticket, for baggage except for wearing apparel, and then only for one hundred dollars in value, unless a contract in writing is made for a greater value. This ticket is void unless officially stamped and dated, and the coupons belonging to this ticket will be void if detached." A coupon was attached which was, in effect, an order on the Southern Pacific Company for a ticket over its line from Portland, Or., and the Corvallis & Eastern to Newport and return. On the same day the plaintiff left Spokane, and pursued her journey with an interruption of one day in Portland, Or., occasioned by the fact that no trains ran on the Corvallis & Eastern road on Sunday. Her baggage was checked to Newport by the Oregon Railroad & Navigation Company. She left Newport on the 11th day of September, 1907. The agent of the Corvallis & Eastern Road at Newport gave her a local check that in so far as the railroad companies engaging to carry this passenger are concerned was good only over the line of that road. However, plaintiff swears, and her testimony is not contradicted in that behalf, that the word "Spokane" was marked on the local check as the destination of her baggage. She arrived in Spokane a day or two later, and presented her check to the local agent of the Oregon Railroad & Navigation Company. The company was unable to deliver the baggage, and undertook to recover it for her. The baggage was not found, and plaintiff began this action to recover its value, which she alleged to be the sum of \$500. Defendant denied all liability, and set up the particular defenses that in selling the ticket to Newport and return it acted merely as the agent of the connecting carriers; that its relation to the transaction was clearly set forth in the conditions printed in the body of the ticket; that it is not shown that the baggage ever came into the possession of appellant, and for these reasons plaintiff had no right of recovery against it. From a verdict in favor of the plaintiff for the sum of \$500, defendant has appealed.

Without speculating on the various questions that have been entertained in the cases, and which have led to hopeless contrariety of opinion as to the effect to be given to the passenger's knowledge or lack of knowledge, or opportunity to know the

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character and effect of the contract printed on a railroad ticket, and the extent to which the common-law liability to transport a passenger to his destination may be limited by special contract, we shall assume for the purposes of this opinion that the respondent had full knowledge of all the conditions, reserving the question whether the attempt of the appellant to limit its liability to losses occurring on its own line was, considering the facts presented in the record, effectual to accomplish its purpose. It seems to be settled by practically all of the cases that it is the duty of the carrier issuing a coupon ticket, in the absence of any special contract limiting its liability, to carry the passenger only to the end of its line and deliver to the next carrier in the route beyond. "This rule of liability is adopted generally by the courts in this country, and is in itself so just and reasonable that we do not hesitate to give it our sanction." *Michigan Cen. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. 324, 21 L. Ed. 297. And in *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827, it was said: "A fair result of the American cases limits the carrier's liability as such when no special contract is made to his own line." The cases were followed in *Michigan Cen. R. Co. v. Myrick*, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 235, where it was said: "In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence." These cases were followed in *Penn. R. Co. v. Jones*, 155 U. S. 333, 15 Sup. Ct. 136, 39 L. Ed. 176. It is also a rule well within the great weight of authority that the nature of the contract must be determined by a consideration of all the circumstances attending the particular case presented, and that the ticket itself is not the only evidence that may be introduced and considered; for, notwithstanding the form of the ticket and the construction put upon it by the carrier, circumstances may be such as to imply an entirely different contract. *Penn. R. Co. v. Loftis*, 72 Ohio St. 288, 74 N. E. 179, 106 Am. St. Rep. 597. In fact, the most striking incident of our present inquiry is that each case involving the reasonableness of conditions printed upon railroad tickets is to be determined not as an abstract proposition, but measured rather by their application to the particular facts disclosed in the instant case.

The principal question for our determination is the legal effect of the contract above quoted. The interest of the public in the matter and manner of the transportation of passengers or goods is such that all contracts limiting liability made or attempted to be made by the carrier will be construed in the light of public policy. A part of the burden of properly disposing of this case is overcome by the case of *Allen v. Canadian Pacific R. Co.*, 42 Wash. 64, 84 Pac. 620, which commits this court to this doctrine. While there have been a number of cases cited that are seemingly in

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point, we think the limitation clause of the contract now before us should be construed with reference to the principal engagement and conduct of the appellant. It would be manifestly unfair and unjust, under the facts of this case, to hold that a carrier could sell a ticket for continuous passage to a certain point on or over the lines of connecting carriers, and at the same time limit its liability to answer only for loss of baggage occurring on its own road. The general rule is that a through ticket, whether over one line or over the lines of connecting carriers, entitles the passenger to an entire trip and to have his baggage checked through to his destination. A through contract as to a passenger is a through contract as to his baggage. *Hutchinson on Carriers* (3d Ed.) 1296. In the case at bar appellant became the contracting party. It undertook to provide respondent with passage from Spokane to Newport, Or., and return, over its own line, the Southern Pacific in Oregon, and Corvallis & Eastern Railroad Company. It fixed the condition that the trip should be continuous, and checked her baggage to its destination. It assumed to make the contract for itself as well as the connecting carriers. The condition requiring a continuous passage relieved the contract of the rule generally applied to coupon tickets, where a passenger may pursue his journey at his own pleasure, checking his baggage from place to place, thus taking it out of the control of the contracting carrier. A coupon ticket does not import a continuous passage, and the rule of law applicable to ordinary coupon tickets should not be made to apply to a case like the one before us. *Hutchinson on Carriers* (3d Ed.) 1049. Respondent had a right to assume that, having to meet the same condition on the return trip, she would have the same privilege of checking and the same protection for her baggage through to her destination in returning that she had in going. The Corvallis & Eastern Road accepted the passenger and her baggage upon the terms fixed by the first carrier; that is, a round-trip excursion ticket calling for a continuous passage with her baggage, and was bound in law to return her upon the same terms and with like privileges as had been given her by the appellant at Spokane. It did not do so. It gave her a local baggage check, good only over its own line, without calling her attention to its character, knowing that, if she stopped over at any way point or junction to recheck her baggage, she would forfeit her ticket. This condition was within the knowledge of appellant when it became the contracting party, and, whatever its attempt to make itself an agent of the connecting carrier may have been as between the carriers themselves, it became as to the respondent a principal, and liable to her as a guarantor that she and her baggage would be returned to her home under the same conditions as it had, in fact, transported her. She is not bound to go seeking for her baggage or for the negligent carrier. While the Oregon Road would in our judg-

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ment be also liable to answer for its negligence, respondent can sue on her contract, and that we have shown was with the appellant. In the case of *Allen v. Canadian Pacific R. Co.*, speaking to this point, the court said: "In fact, it seems to us that to deny this right to the shipper would be equivalent to a denial of justice at the hands of the law. The money is paid in one lump sum. The equitable distribution of this money is not within the province of the shipper. He has no way of ascertaining what the contract is between the different connecting lines in relation to their recompense or responsibility, and, if his goods are lost or damaged, he is relegated to a search across the continent to obtain information as to the responsibility of the different carriers for the damage, information which, in many cases, would be entirely unavailable. He has no way of accompanying the goods to look after them himself; probably would not be allowed to do so, under the transportation rules of the different companies, if he were so inclined. He deals with one company, which accepts his goods, receipts him for the same, and contracts to carry them to their destination; and any rule which would throw upon him the difficulties we have suggested would be unnecessary and inequitable." Escape from this reasoning is sought in the suggestion that a different rule prevails between the carriers of freight and baggage, in that a passenger accompanies his baggage and can look out for it. While in theory this may be true (it has been so decided by some courts), yet in fact and in practice nothing can be further from the truth. To undertake to look after baggage under modern conditions of travel would put an impossible burden on the passenger, and an attempted compliance on the part of the traveling public would result in a condition intolerable to the railroad companies. In the case of *Atchison, etc., R. Co. v. Roach*, 35 Kan. 740, 12 Pac. 93, 57 Am. Rep. 199, cited by appellant, it was held that the last carrier was not liable for the loss of baggage, in the absence of a showing of such community interest as would make the carriers partners *inter sese*, and that the sale of a through ticket over the route by the connecting carriers, and the checking of baggage to the end of the route without other evidence to show the relations of the companies, would not bind the last carrier as a principal. Without admitting the rule, it seems to us that the difference between that case and this is suggested by the conclusion reached by the court. The argument made to exempt the last carrier would bind the first carrier had it been the defendant. The court said: "The theory that the defendant company was the original contracting carrier finds no support in the testimony, and no liability arises against the company on that ground. Where, then, is the liability? It is contended by the railroad company that the New York, Lake Erie & Western Railroad Company, being the first carrier, is alone

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liable. While a railroad company cannot be compelled to transport to appoint beyond its own line, it is well settled that it may lawfully contract to carry persons and property over its own and other lines to a destination beyond its own route; and, when such a contract is made, it assumes all the obligations of a carrier over the connecting lines as well as its own. In such cases the connecting carriers engaged in completing the carriage are deemed to be agents of the first carrier, for whose negligence and default the contracting carrier becomes liable. *Berg v. Atchison, T. & S. F. R. Co.*, 30 Kan. 561, 2 Pac. 639; *Lawson, Carr.* § 235; *Hutch. Carr.* § 145; *Thomp. Carr.* § 431; 2 *Rorer, R. R.* 1234. Of course, a railroad company or other common carrier may limit its liability to the loss or injury occurring on its own line, and the understanding or contract between the parties is to be determined from the facts of each case. Some of the courts have held that the mere acceptance of the property marked for transportation to a place beyond the terminus of the road of the accepting carrier amounts to an undertaking to carry to the ultimate destination, wherever that may be, and, in the absence of any conditions or limitations to the contrary, will make it liable for loss occurring upon connecting lines as well as its own; while others hold that in such a case the carrier is only bound to safely carry to the end of its own route, and there to deliver to the connecting carrier for the completion of the carriage. *Lawson, Carr.* §§ 238-240. But where a railroad company sells a through ticket for a single fare over its own and other roads, and checks the baggage of the passenger over the entire route, more is implied, it seems to us, than in the mere acceptance of the property marked for a destination beyond the terminus of its own line. The sale of a through ticket, and the checking of the baggage for the whole distance, is some evidence of an undertaking to carry the passenger and baggage to the end of the journey. The contract need not be an express one, but may arise by implication, and may be established by circumstances, the same as other contracts. In Wisconsin a passenger purchased a through ticket from the Chicago & Milwaukee Railroad Company from Milwaukee to New York City, and at the same time delivered her trunk to that company, and received therefor a through check to New York City. Upon arrival at New York the trunk was found to have been opened and some of the articles taken therefrom. The Supreme Court in ruling upon the effect of the railway company issuing the through ticket and check stated that 'the ticket and check given by the Chicago & Milwaukee Railroad Company implied a special undertaking by that company to safely transport and carry, or cause to be safely transported and carried, the plaintiff and her baggage over the roads mentioned in the complaint, from Milwaukee to the city of New York. This, we think, must, in legal contempla-

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tion, be the nature and extent of the contract entered into and assumed by that company when it sold the plaintiff the through ticket, and gave a through check for the trunk, and received the fare for the entire route.' *Candee v. Pennsylvania R. Co.*, 21 Wis. 589, 94 Am. Dec. 566; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332, 76 Am. Dec. 749; *Carter v. Peck*, 4 Sneed (Tenn.) 203, 67 Am. Dec. 604; *Railroad Co. v. Weaver*, 9 Lea (Tenn.) 38, 42 Am. Rep. 654; *Baltimore & O. R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. Rep. 617; 2 Rorer, R. R. 1001. From the authorities we conclude that the sale of a through ticket for a single fare by a railroad company to a point on a connecting line, together with the checking of the baggage through to the destination, is evidence tending to show an undertaking to carry the passenger and baggage the whole distance, and which, in the absence of other conditions or limitations and of all other circumstances, will make such carrier liable for faithful performance, and for all loss on connecting lines, the same as on its own. The liability of the first carrier does not necessarily relieve the defendant company from responsibility. Each carrier is liable for the result of its own negligence; and, although the first carrier may have assumed the responsibility for the transportation to a point beyond its own route, any of the subsequent or connecting carriers to whose default it can be traced will be liable to the owner for the loss of his baggage. *Hutch. Carr.* § 715; *Aigen v. Boston & M. R. Co.*, 132 Mass. 423; *Railroad Co. v. Weaver*, 9 Lea (Tenn.) 39, 42 Am. Rep. 654." The case of *Felder v. Columbia, etc., Ry. Co.*, 27 Am. & Eng. Ry. Cas., 264, is the one most relied upon by appellant. This was a case sounding in tort against the last carrier. We do not consider it in point. Another leading case upon which dependence is put is that of *Minor v. New York Cent. R. Co.*, 53 N. Y. 363. In that case the contracting carrier was sued for a loss occurring off of its line, and the court held it was not liable on the theory that it acted as the agent of the negligent carrier merely for the purpose of selling its tickets. The force of this case as an authority is probably overcome, if, indeed, the theory upon which it rests is not absolutely destroyed, by the later case of *Hutchins v. Penn. R. Co.*, 181 N. Y. 186, 73 N. E. 972, 106 Am. St. Rep. 537, wherein the *Milnor Case* was relied on, among others, by appellant, and cited as controlling in a dissenting opinion rendered by Justice O'Brien.

Reference to the innumerable cases against carriers upon the subject of liability for lost baggage or freight shows that, if the last carrier is sued, it generally depends upon the ground that it was not a party to the contract, or that the goods did not come into its possession, whereas, if the contracting carrier is sued, it usually defends upon the theory that it acted only as agent for the connecting carrier, and, in the absence of a special contract

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or the disclosure of facts showing a partnership, it is not bound to answer; thus in either event binding the party damaged to the production of proof entirely beyond his control, and making his recovery almost, if not absolutely, impossible. He might have to go from one to the other, through all the connecting systems, to find the responsible party. The only just rule is to bind the contracting carrier to its contract, where the facts in the given case warrant it, and to hold all other connecting carriers to answer for their negligence, in which event it would no doubt be necessary to show that the baggage had actually come into the possession of the negligent carrier. Here appellant was the contracting party. It agreed in law to do all that the party paid for, and is held on the contract rather than on the theory of tort. The effect of the ticket issued to respondent was to deprive her of the opportunity of looking after her baggage. If it expected to put that duty upon her, it should have so informed her. The conduct of appellant was inconsistent with the condition printed on the ticket, and raised an implied contract that her baggage would be returned in like manner as it had been forwarded. The nature of appellant's engagement was such as to make the delivery of the baggage of respondent to the Corvallis & Eastern Company a delivery to the appellant. The court below allowed a recovery for the full value of the baggage as alleged by respondent. The fourth condition upon the ticket issued to respondent is as follows: "The baggage liability limited to wearing apparel not exceeding \$100 in value." In such cases the same rule applies to baggage as to freight. 6 Cyc. 663. It has been almost universally held that this condition, when attached to a ticket sold at a price below the usual fare, is a reasonable one, and will be enforced by the courts. The respondent's recovery should have been limited to the amount agreed upon. *Windmiller v. Northern Pacific Ry. Co.* (Wash.) 101 Pac. 225; *Jansen v. Spokane Falls & N. Ry. Co.* (Wash.) 98 Pac. 1124; *Hill v. Northern Pacific Ry. Co.*, 33 Wash. 697, 74 Pac. 1054; *Hart v. Penn. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; *The Priscilla* (D. C.) 106 Fed. 739.

This case will therefore be affirmed, with instructions to the lower court to enter a judgment in favor of respondent for the sum of \$100. Appellant will recover its costs in this court.

RUDKIN, C. J., and DUNBAR, MOUNT, and FULLERTON, JJ., concur. CROW, GOSE, PARKER, and MORRIS, JJ., took no part.

POWERS v. OLD COLONY ST. RY. CO. (two cases).

(Supreme Judicial Court of Massachusetts, Plymouth, Feb. 24, 1909.)

[87 N. E. Rep. 192.]

Carriers—Obstruction in Route—Injury to Person Passing Obstruction—Actions—Question for Jury—Due Care.—Whether a person, who had left a street car in the night to pass on foot an obstruction in the route and take a car on the other side, was exercising due care when she fell and was injured, held, under the facts, for the jury.

Carriers—Obstruction in Route—Invitation to Passengers to Take Path Around Obstruction.—Evidence held to show that a street car company, whose route had been obstructed, voluntarily provided and pointed out a way for passengers around the obstruction to a point where the railway was continued, and invited them to pass over it.

Carriers—Obstruction in Route—Invitation to Passengers to Take Path Around Obstruction—Duty of Carrier.—Where a street car company, whose line has been obstructed, voluntarily provided and pointed out to passengers a path around the obstruction to a point where the route was continued, it assumed an obligation to make reasonable provision for their safety while so passing, regardless of whether the relation of carrier and passenger existed while they were passing around the obstruction.

Carriers—Obstruction in Route—Invitation to Passengers to Take Path Around Obstruction—Duty of Carrier.—The fact that the carrier had not obtained permission from the owner of the land over which the path lay to use the land, so that both the carrier and those using the path were trespassers against the owner, did not relieve the carrier from its duty to exercise due care for the safety of those it invited to use the path.

Carriers—Injury to Person Passing Around Obstruction in Route—Actions—Question for Jury—Due Care.—In an action against a street car company for injuries to plaintiff, who had left its car to pass an obstruction and take a car on the other side, and who fell over an impediment in the path furnished by the company for the purpose of passing the obstruction, whether the company made reasonable provisions for the safety of the plaintiff while passing over the path held, under the facts, to be for the jury.

Carriers—Obstruction in Route—Injury to Person Passing Obstructions—Action—Admissibility of Evidence.—In an action against a street car company for injury to plaintiff, who had left a car to pass an obstruction and take a car on the other side, and who fell over an impediment in the path, evidence that electricity for lighting the path was furnished by the company, and that on the last trip the lights were shut off by the conductor, was admissible to show an invitation of the company to its passengers to use the path.

Powers v. Old Colony St. Ry. Co

Exceptions from Superior Court, Plymouth County; Lloyd E. White, Judge.

Actions by Mary Powers and Edward Powers against the Old Colony Street Railway Company. Verdict for plaintiff in each case, and defendant excepts. Exceptions overruled.

Fowler, Dean, Bauer & Kenney, for plaintiffs.

Asa P. French and Jas. S. Allen, Jr., for defendant.

KNOWLTON, C. J. These are two actions of tort, one brought by a woman, to recover for a personal injury, and the other by her husband, to recover for the cost of medical attendance and for other expenses incurred by reason of the injury.

On the line of the defendant's railway work was going on in the abolition of a grade crossing of the Old Colony Railroad, such that the running of the defendant's cars was interrupted, and it became necessary for passengers to leave the cars, go around an obstruction on foot, and take other cars to continue their travel on the other side. The distance between the cars on the opposite sides of the obstruction, by the route which was regularly traveled, was about five minutes' walk. By the nearest public highway, it was about a mile and a half. The path used led across private land for about 220 feet, and the evidence showed that this was very rough plowed ground, with stones and other irregularities in it, upon which the passengers, by use, had worn a kind of path about 4 feet wide, which was more or less irregular. The accident happened in the evening, and it was dark. Some of the witnesses said it was extremely dark. The female plaintiff, hereinafter called the plaintiff, struck her foot against a large stone which projected into the path, and she fell and was injured. When the car on which she was riding reached the obstruction, the conductor called, "All change to forward car," and the motorman led the way, the passengers, about 15 in number, following him, most of them in single file. Notwithstanding the presence of two or three electric lights maintained by the defendant not far away, and notwithstanding the fact that the plaintiff had passed over the place previously in the daytime, we think it plain that it was a question for the jury whether she was in the exercise of due care.

The principal question is whether there was evidence of negligence on the part of the defendant. Because of the impossibility of running its cars upon the highway where the work was going on, the defendant was relieved of its obligation to carry passengers in that part of its route, and it might have declined to continue in any relation to them after they left its car on one side of the obstruction until they were received upon the car on the other side. But it did not choose to do this. The judge ruled, at the defendant's request, that the plaintiff was not a pas-

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senger while passing from one car to the other. It is questionable whether there was not evidence from which the jury might have found that the relation of passenger and carrier was continued while the passengers were passing from one car to the other. However that may be, there was evidence that the defendant voluntarily provided and pointed out a way for them, over which it invited them to pass, and thereby assumed an obligation to make reasonable provision for their safety, having reference to existing conditions. The fact that the defendant had not obtained from the owner a legal right to use the land did not relieve it of the obligation which arose from its relation to the plaintiff, and from the invitation which it gave her to use the place as if the defendant had hired it and provided it for the use of passengers. The defendant had established and was maintaining electric lights for the convenience of passengers walking across this land, and its passengers had been passing over the land several weeks before the accident, under circumstances which amounted to an implied invitation on the part of the defendant to go by this route. The plaintiff might well believe, from the conduct of the defendant, that it had arranged with the owner for the use of his property for this purpose. The fact that, as against the owner, they were all trespassers is immaterial. *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216; *Kuhlen v. Boston & Northern Street Railway Co.*, 193 Mass. 341, 97 N. E. 815, 7 L. R. A. (N. S.) 729, 118 Am. St. Rep. 516; *Cotant v. Boone Suburban Railway Co.*, 125 Iowa, 46, 99 N. W. 115, 69 L. R. A. 982; *Vicksburg Meridian R. R. Co. v. Howe*, 52 Miss. 202; *Finseth v. Suburban Railway Co.*, 32 Or. 1, 51 Pac. 84, 39 L. R. A. 517; *Weld v. New York, etc., R. R. Co.*, 68 Hun, 249, 22 N. Y. Supp. 974.

Whether the defendant properly performed its duty to make reasonable provision for the safety of the plaintiff, in view of its implied invitation to walk across private land, was a question of fact for the jury. It was for them to consider all the circumstances of the case and determine what was reasonable. The roughness and irregularity of the path, the presence of large stones in or near it, the ease or difficulty of furnishing better light, or of giving effectual warning, were all matters of fact proper for their consideration. This question was rightly submitted to the jury.

The testimony of the motorman that the electricity for the lights was furnished by the defendant, and that on the last trip the lights were shut off by the conductor tended to show that the lights were furnished and maintained and managed by the defendant. It was competent evidence of an invitation to the defendant's passengers to use this route.

Exceptions overruled.

LOUISVILLE & N. R. CO. *v.* MOTTLEY *et ux.*

(Court of Appeals of Kentucky, May 4, 1909.)

[118 S. W. Rep. 982.]

Statutes—Construction—Prospective Construction.—Statutes will not be given a retrospective construction, unless the language precludes a reasonable doubt that the Legislature intended a prospective construction.

Carriers—Regulations—Construction—Retrospective Operation.—Act Cong. June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), prohibits any common carrier from directly or indirectly giving any interstate free transportation for passengers. Section 2 prohibits carriers from charging any different compensation for carrying passengers between points named in its tariff, as filed, than the fare specified therein, or from refunding any part of the fares, or from extending to any person any privileges except as specified in such tariff. Held, that the statute applied to the contract under which any pass, etc., was issued, and not simply to its issuance, and was not retrospective, so that it would not apply to a contract made in 1871, by which a carrier agreed to issue an annual pass to one injured, in settlement of his claim for damages, though annual passes were issued under the contract after the statute was enacted.

Constitutional Law—Obligation of Contracts—Impairment—Power of Congress—Presumptions.—The federal Constitution does not inhibit Congress from impairing the obligation of contracts, but the same moral obligation not to enact such unjust laws rests upon it as upon the states, and it will be presumed that Congress did not intend to impair contract obligations, unless a clear intent to do so appears.

Carriers—Statutory Regulation—Federal Anti-Pass Law—"Free Passes."—Annual passes, issued pursuant to a contract by which a carrier agreed to issue an annual pass for life to one injured by it in settlement of his claim for damages, are not "free passes" within Act Cong. June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892), prohibiting any common carrier from directly or indirectly giving any interstate free pass or ticket for passengers except to employees, nor did the contract violate section 2, prohibiting carriers from charging any different compensation between points named in its tariff than the fare specified therein, or from extending to any person any privileges except as specified in its tariff; it not appearing that the contract discriminated in favor of the person injured.

Carriers—Carriage of Passengers—Passes—Legality.—A contract made in 1871, by which an interstate common carrier agreed to issue annual passes for life to one injured, in settlement of his claim for damages, was legal and valid when made.

Louisville & N. R. Co. v. Mottley

Appeal from Circuit Court, Warren County.

"To be officially reported."

Action by Erasmus L. Mottley and wife against the Louisville & Nashville Railroad Company to compel specific performance of a contract of carriage. From a judgment for plaintiffs, defendant appeals. Affirmed.

See, also, 150 Fed. 406, 211 U. S. 149, 29 Sup. Ct. 42, 53 L. Ed. —.

Henry L. Stone and Sims, Du Bose & Rodes, for appellant.

Clarence U. McElroy, Wright & McElroy, and G. Duncan Milliken, for appellees.

BARKER, J. In 1871 the appellees, Erasmus L. Mottley and Annie E. Mottley, his wife, were seriously injured in an accident occurring to one of appellant's passenger trains while they were being transported as passengers from their home, in Bowling Green, to Louisville, Ky. In full settlement of all claims for damages on the part of the appellees, the appellant agreed, in writing, to furnish them free transportation over its line for the remainder of their lives. The contract is as follows: "Louisville, Ky., Oct. 2, 1871. The Louisville & Nashville Railroad Company, in consideration that E. L. Mottley and wife, Annie E. Mottley, have this day released said company from all damages or claims for damages for injuries received by them on the 7th of September, 1871, in consequence of a collision of trains on the road of said company at Randolph's Station, Jefferson county, Ky., hereby agrees to issue free passes on said railroad and branches, now existing or to exist, to said E. L. Mottley and wife, Annie E. Mottley, for the remainder of the present year and thereafter to renew said passes annually during the lives of said Mottley and wife, or either of them. Thos. J. Martin, Vice President Louisville & Nashville Railroad Company. Willis Raney, Secretary. [Seal.]" This contract was faithfully carried out by the appellant until after the enactment by the Congress of the United States, on June 29, 1906, of "An act to amend an act, entitled an act to regulate commerce, approved February 4, 1887" (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892]), When, becoming apprehensive lest the further issuance of passes to appellees under the contract was within the prohibition of the act of Congress, it declined to carry out its agreement any further, whereupon the appellees first instituted an action for the specific enforcement of the contract in the Circuit Court of the United States for the Western District of Kentucky, where a judgment was rendered as prayed for in the petition. *Mottley v. L. & N. R. R. Co.* (C. C.), 150 Fed. 406. But upon appeal to the Supreme Court of the United States this judgment was reversed upon the ground

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of want of jurisdiction in the federal court to entertain the cause of action. See *L. & N. R. Co. v. Mottley*, 211 U. S. 149, 29 Sup. Ct. 42, 53 L. Ed. —. Whereupon the appellees instituted this action in the Warren circuit court, with the result that a judgment was rendered requiring the appellant to perform the contract. To review this judgment this appeal has been prosecuted.

The Louisville & Nashville Railroad Company is a common carrier engaged in the business of interstate and intrastate commerce, and the specific performance of the contract in question involves both interstate and intrastate commerce. Therefore one of the questions arising upon this record is whether or not the contract is specifically enforceable under the provisions of the act of Congress before referred to, and which is fully pleaded and relied upon by the appellant as a bar to appellees' cause of action. So much of the federal statute pleaded by the appellant as is deemed necessary to be herein set forth is as follows:

"Section 1. * * * No common carrier subject to the provisions of this act shall, after January 1, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees.

"Sec. 2. * * * No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers, or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of the act; nor shall any carrier charge, or demand, or collect, or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner, or by any device, any portion of the fares, rates and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. * * *

The violation of these sections of the statute is punishable by heavy fine.

No question of the good faith of the parties in making the contract is raised, and the length of time it has existed prior to the enactment of the federal statute precludes the possibility of any intent to evade its provisions. The first question, then, arising upon the record is whether or not the Congress, in the enactment of the statute, intended to abrogate existing contracts such as the one in question—in other words, whether the statute was intended to be retroactive in its effect on pre-existing contracts, or whether it was intended to be prospective in its effect

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—and, second, whether or not the contract in question is within the purview of the federal statute at all.

The rule is well settled that statutes will always be construed to be prospective, and not retrospective in their effect, unless the language so plainly expresses a retrospective intent as to preclude a reasonable doubt that the Legislature meant it to be prospective. Cooley, in his work on Constitutional Limitations, in speaking of this rule of construction (page 529), says: "Nevertheless, legislation of this character is exceedingly liable to abuse; and it is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." And Endlich, in his work on the Interpretation of Statutes (section 271), uses this language: "Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. * *

* They are construed as operating only on cases or facts which come into existence after the statutes were passed, unless a retrospective effect be clearly intended." There is nothing in the language of the enactment by Congress, under discussion, which purports to give a retrospective effect to its operation; on the contrary, the intent that the statute should have a prospective effect only appears from a most cursory reading of the language used, unless it is applied to the actual issuance of the passes and not to the contract under which they are issued. We do not think it admissible to so construe the language of the statute as to hold that it applies simply to the issuance of a pass or ticket for transportation, rather than the contract under which the pass is issued. It is true that, in the execution of the contract made in 1871, it has been the custom of the railroad company to issue passes to the appellees annually, and therefore, if we fix our attention exclusively upon this annual issuance of tickets for transportation, it might seem that these fall within the letter of the statute because they are actually issued since the enactment; but this narrow view of the matter is inadmissible. The passes or tickets actually issued are in execution of the contract made in 1871, and, unless this contract is invalidated by the statute, its language cannot be applied to the mere issuance of the tickets. If the contract remains legally in force, the means by which it is executed cannot be invalid or illegal.

Passing now to the second question, we are of opinion that the contract between the appellant and the appellees does not fall at all within the meaning of the language used in the statute. The statute inhibits the issuance by common carriers doing interstate commerce of free tickets or passes for transportation, except to employees. The tickets or passes issued to the appellees in execution of the contract cannot in any real sense be called free. They are paid for in money, just as certainly as if

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the actual cash was handed over to the agent of the railroad by the appellees in payment for a trip ticket. The appellees had received serious bodily injuries caused by the negligence of the railroad, and the latter was liable to them for damages, which, unless the matter was settled amicably, would have to be liquidated by the verdict of a jury and the judgment of a court. It was entirely competent for the parties thus standing towards each other to settle this unliquidated claim or demand for money and agree upon its value. They did so, and it was stipulated that the amount of damages suffered by appellees was equal in value to such transportation as they should afterwards choose to make over its line during their natural lives. At the time this agreement was made, it was entirely legal and valid, and, as said before, it was made in absolute good faith by the parties. Now, suppose, instead of carrying out the contract in the manner adopted, the railroad had agreed that it was liable to appellees for the sum of \$10,000, and had paid over to them that sum, and then appellees had chosen, as they might have done, to hand back the amount received, and thus purchase from the railroad with actual cash transportation for life—would tickets issued under this agreement be called “free tickets,” or “free passes”? We think not, and yet it would be difficult to find a difference in principle between the contract actually made and that supposed. It does not require more than a slight investigation to reach the conclusion that the contract made by the parties was very much to the advantage of the railroad as against the payment by it of such sum as the jury might assess in actual cash if the matter had progressed to a judgment for damages.

It may be admitted, for the purposes of this case, that Congress could have framed the statute so as to abrogate the contract under discussion. There is no constitutional inhibition upon Congress passing laws to impair the obligation of contracts as there is against the states passing such laws; but the same moral obligation against such unjust laws rests upon the general government as upon the state government, and we must presume that the general government never intends to impair the obligation of existing contracts, unless an imperative necessity exists for so doing, and a clear intent to do so is expressed. It would be a great hardship upon appellees to invalidate the contract between them and appellant. The time has long since passed under the operation of the statute of limitations, when they could institute or maintain an action against the railroad for the injuries received by them in 1871, so that if the contract is invalidated now, they would lose absolutely what remaining value it has. This property right will be taken from them without any consideration, and we would be justified in reaching the conclusion that Congress intended to invalidate the contract and thus take from appellees their property rights without remuneration only because the language used precludes any other construction.

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In the case of *United States v. Kirby*, 74 U. S. 486, 487, 19 L. Ed. 278, the Supreme Court said: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will also therefore be presumed that the Legislature intended exceptions to its language, which would avoid results of that character. The reason of the law in such cases should prevail over the letter." In the case of *Carlisle v. United States*, 16 Wall. 153, 21 L. Ed. 426, the rule is thus stated: "All general terms in the statutes should be limited in their application, so as not to lead to injustice, oppression, or unconstitutional operation; if that be possible. It will be presumed that the exceptions were intended which would avoid results of that character." And in *Market Co. v. Hoffman*, 101 U. S. 116, 25 L. Ed. 782, it was said: "In *Brewer's Lessee v. Bloughter*, 14 Pet. 178, 10 L. Ed. 108, it was said to be the undoubted duty of the court to ascertain the meaning of the Legislature, from the words used in the statute and the subject-matter to which it related, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of the language would extend to cases which the Legislature never designed to include in it." See, also, *Chew Heong v. United States*, 112 U. S. 555, 5 Sup. Ct. 255, 28 L. Ed. 770; *Holy Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; *Bate Refrigerator Co. v. Sulzberger*, 157 U. S. 37, 15 Sup. Ct. 508, 39 L. Ed. 601.

As we have said before, the very case we have here was decided in the Circuit Court of the United States for the Western District of Kentucky in favor of the appellees. *Mottley v. L. & N. R. R. Co.*, *supra*. It is true, the judgment was reversed by the Supreme Court of the United States because of want of jurisdiction in the federal court to entertain the cause of action set up by appellees; but we think the painstaking and thorough opinion rendered by the learned federal judge upon the merits of the case is very instructive, and we rely upon it with confidence. Nor are we unmindful of the opinions in *Southern Wire Co. v. St. Louis Bridge & Tunnel R. Co.*, 38 Mo. App. 191, and *Fitzgerald v. Grand Trunk R. Co.*, 63 Vt. 169, 22 Atl. 76, 77, 13 L. R. A. 70, which hold that existing traffic contracts discriminating as to rates between shippers were repealed by the interstate commerce act of 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]). The opinions in these cases rest, in part, at least, upon the fact that the discriminating contracts by common carriers between their patrons were illegal at the common law, and could not be upheld in any event; but, without examining this phase of the case too minutely, it is sufficient to say that, in our opinion, they can be distinguished from that at bar. Those contracts were wholly executory, and fell

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within the precise reason for the enactment of the act of Congress prohibiting discrimination in interstate commerce. In the case at bar the appellees' part of the contract was entirely executed. They had paid over to the railroad company the whole consideration moving from them for the contract. To annul this contract now would be to confiscate the consideration paid by them. Nor was that contract in any wise illegal or questionable at the time it was made. On the contrary, as we understand it, it was entirely legal and valid. There is nothing in this record to show that the contract in any wise discriminates in favor of appellees. On the contrary, we think it highly probable that they pay for their railroad transportation under its terms a very much larger sum in money than the ordinary passengers do. In other words, judging from ordinary experience in such cases, where neither the liability nor the extent of the damages is questioned, we think it more than probable that the verdict appellees would have received at the hands of a jury, if invested, would produce a sum which would more than pay for the transportation which they actually received under the contract. Of course, this is somewhat problematical; but, as the railroad thought it was to its interest to make the contract, we cannot believe that our supposition is overstrained.

For these reasons we are of opinion that the contract under discussion does not fall within the terms of the federal statute, and that the judgment of the trial court should be affirmed, and it is so ordered.

LOUISVILLE RY. CO. v. KUPPER.

(Court of Appeals of Kentucky, April 20, 1909.)

[118 S. W. Rep. 266.]

Carriers—Carriage of Passengers—Performance of Contract of Transportation.*—A carrier is liable for the acts of the servant in charge of or having control over the passengers, amounting to a breach of the duty of transporting the passengers safely.

Carriers—Personal Injuries—Assaults by Employee.†—Plaintiff, a passenger on defendant's street car, was knocked from the car by the conductor, the assault being continued in the street, and on the approach of an officer the conductor directed him to arrest plaintiff, which he did. Held, that the whole affair was but a single transaction, and that defendant was liable for both the assault and the arrest if unlawful, and it was not error to omit from the instructions the question whether or not the conductor was acting within the scope of his employment at the time he directed the arrest.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

"Not to be officially reported."

Action by Henry L. Kupper against the Louisville Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Fairleigh, Straus & Fairleigh and *Howard B. Lee*, for appellant.

Edwards, Ogden & Peak, for appellee.

CLAY, C. Plaintiff, Henry L. Kupper, instituted this action

*As to the liability of carriers of passengers for acts and omissions of servants, see extensive note, 6 R. R. R. 170, 29 Am. & Eng. R. Cas., N. S., 170.

†For the authorities in this series on the subject of the liability of the carrier for assaults on its passengers by its employees, see first foot-note of *Birmingham, etc., Co. v. Yielding* (Ala.), 30 R. R. R. 285, 53 Am. & Eng. R. Cas., N. S., 285; foot-note of *Riser v. Southern Ry. Co.* (S. Car.), 10 R. R. R. 244, 34 Am. & Eng. R. Cas., N. S., 244, where all those preceding it are collected or referred to.

For the authorities in this series on the question whether railroad companies are liable on account of arrests or prosecutions made or instigated by their employees or agents, see foot-note of *Higby v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 479, 37 Am. & Eng. R. Cas., N. S., 479, where all those preceding it are collected; foot-note of *Baltimore, etc., Ry. Co. v. Ennalls* (Md.), 30 R. R. R. 42, 53 Am. & Eng. R. Cas., N. S., 42; last foot-note of *Conklin v. Consolidated Ry. Co.* (Mass.), 29 R. R. R. 573, 52 Am. & Eng. R. Cas., N. S., 573; third head-note of *Zeccardi v. Yonkers R. Co.* (N. Y.), 28 R. R. R. 771, 51 Am. & Eng. R. Cas., N. S., 771.

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against defendant, Louisville Railway Company to recover damages for an unlawful assault alleged to have been committed by defendant's conductor, and for a false arrest alleged to have been brought about by defendant's conductor. The jury returned a verdict in favor of plaintiff in the sum of \$250, and the defendant appeals.

It appears from the record that while plaintiff was a passenger on defendant's car on Fifteenth street, in the city of Louisville, a discussion arose between him and the defendant's conductor as to whether or not he had spit on the floor of the car or through a crack in the floor onto the street. This discussion ended a few moments prior to the time that the assault took place. Just before the car approached Maple street, where the assault and arrest occurred, plaintiff asked of one Mr. Phillips, who was a passenger on the car, the question: "Is that your dog?" When this question was asked, the conductor began to look for the dog. As a matter of fact there was no dog on the car, and the passengers, entering into the joke, began to laugh at the conductor. This remark was evidently made for the purpose of teasing the conductor. The latter became incensed. According to the testimony for plaintiff, the conductor struck him in the face while he was standing on the steps, with his hand upon the railing. In falling plaintiff dragged the conductor from the platform into the street. There the fight was continued, several blows being struck on each side. While the fight was in progress, a police officer who was on the car came out. When he reached the plaintiff and the conductor, the latter directed him to arrest plaintiff upon the ground that he was drunk. According to the testimony for the defendant, the plaintiff first assaulted the conductor, and plaintiff was arrested merely because he was engaged in a difficulty, and not because of any direction given by the conductor.

The only error complained of is the giving of the following instruction: "(2) I further instruct you, gentlemen of the jury, that if you believe from the evidence that the plaintiff, Kupper, was arrested by the police officer for disorderly conduct, and such arrest was made by the police officer by reason or as a result of the representations and at the demand of the conductor of the car, and would not have been made by him but for such representations and demand by the conductor, and was not made by the police officer in the line of his duty and upon the information which he had other than the information and the demand of the conductor, and if you further believe from the evidence that there was no reasonable ground for the officer to believe at the time that the plaintiff was guilty of disorderly conduct or violation of the law, then the law of the case is for the plaintiff as to the false arrest, and you should so find." There was evidence to the effect that plaintiff intended to get off the car at

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the point where he was assaulted by the conductor, and, as the direction given to the policeman to arrest him was given by the conductor after plaintiff was off the car, it is insisted that plaintiff was no longer a passenger, and defendant cannot be held responsible.

In the case of *Wise v. Covington & Cincinnati Street Ry. Co.*, 91 Ky. 537, 16 S. W. 351, the rule is thus stated: "If he was compelled or was justified in leaving the car on account of the abuse of the driver, and the driver followed him, continuing the abuse, or for the purpose of beating him, it must be regarded as one continuous wrong, and the company is as much liable as if the beating took place on its car. It is the duty of the driver to protect the passenger from insult and harm, unless the passenger is himself the aggressor, and when he insults the passenger, and then at once pursues him and beats him, returning again to his car, it is all one tort, and cannot be so separated by the acts done as to relieve the company from liability." It is also well settled that an act which amounts to a breach of duty on the part of a carrier towards a passenger, whether an assault, false arrest, insult, or abusive language, etc., makes the carrier liable for the acts performed by the servant who is placed in charge of or has control over the passengers. The law makes no distinction in the kind or character of the wrong done if such wrong amounts to a breach of the undertaking to transport the passenger safely. *Mulligan v. Railroad Co.*, 129 N. Y. 506, 29 N. E. 952, 14 L. R. A. 791, 26 Am. St. Rep. 539; *Lafitte v. Railway Co.*, 43 La. Ann. 34, 8 South. 701, 12 L. R. A. 337; *Stewart v. Railway Co.*, 90 N. Y. 588, 43 Am. Rep. 185. It is insisted, however, for the defendant that, while the rule stated applies to assaults where the assault is begun on the car and continued after the passenger leaves it, it is not applicable to a case of this kind, where the direction to make the arrest was made after the passenger ceased to be a passenger. The evidence in this case shows that plaintiff was a passenger when the assault was first committed. The tort was then begun. The fight between the plaintiff and the conductor was continued on the street. It lasted but for a short time. When the officer approached,¹ the direction to make the arrest was given. The conductor then returned to his car, and the plaintiff was arrested. He was tried the next day in the police court, and discharged. It is manifest that the whole affair of the assault and arrest was but one single transaction. We are unable to see upon what reasoning it can be said that the plaintiff was a passenger while the assault was going on, and not a passenger when the direction to arrest him was given by the conductor. If, as the plaintiff's evidence tended to prove, he was unlawfully assaulted and knocked from the car, and the assault was continued, and the order to make the arrest was immediately given,

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the company was liable both for the unlawful assault and for the unlawful arrest; and it was not error to omit from the instructions the question whether or not the conductor was acting at the time within the scope of his employment.

Finding no error in the record prejudicial to the substantial rights of appellant, the judgment is affirmed.

BIRMINGHAM RY., LIGHT & POWER CO. v. JUNG.

(Supreme Court of Alabama, April 6, 1909. Rehearing Denied May 11, 1909.)

[49 So. Rep. 434.]

Pleading—Passengers—Actions for Injuries—Pleading.—Plaintiff's original complaint alleged that defendant was a common carrier, and that plaintiff, while a passenger of defendant, was injured, and that the injuries were caused proximately by defendant's negligence. Amended counts were filed, averring that plaintiff's injuries were proximately caused by the negligence of defendant's servant or agent while acting within the line of his employment in and about the carriage of plaintiff as a passenger, and that plaintiff's injuries were proximately caused by the willful conduct of defendant's servants or agents acting within the line of their employment in and about the carriage of plaintiff as a passenger, which conduct consisted in causing a car to be set in motion with the knowledge that plaintiff would probably be injured thereby and with reckless disregard of the consequences. Held, that the original count was in case, and those added by amendment were also in case, and constituted no departure, and were properly allowed.

Pleading—Amendment—Relation Back.—The amendment of a complaint relates back to the commencement of the suit.

Carriers—Injuries to Passenger—Pleading.—In an action against a carrier for injuries to a passenger, resulting from the negligence of defendant in failing to give plaintiff sufficient time to resume his place in the cars after he had alighted on the train stopping at a siding, an amended complaint held to sufficiently allege defendant's negligence.

Negligence—Contributory Negligence—Willful Negligence of Defendant.—Contributory negligence is not available against a charge of willful or wanton misconduct.

Carriers—Injuries to Passengers—Taking up Passengers.*—Where a car stops at a place where it is customary for persons to take passage, it is the carrier's duty to use due care to determine, before mov-

*For the authorities in this series on the question whether it is negligence to start a street car while a passenger is attempting to

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ing the cars, that no person is in the act of boarding the same; and if the place is not one where it is customary to receive passengers, but the car has stopped, and a passenger receives permission of the conductor to temporarily leave the car, it is the duty of defendant's servants to exercise due care to know before moving the car that the passenger is not in the act of re-entering the car, or in a position which would be rendered perilous by moving the car; but, if the place where a car is stopped is not the place where passengers are received, there is no breach of duty to one who is attempting to get aboard, if the car is started while he is in a perilous position, unless the servants of the carrier know that by such movement his position is rendered perilous.

Carriers—Injuries to Passengers—Management of Conveyances—Authority of Conductor.—A conductor is the representative of the carrier in charge of a train, and controls the operation thereof, and he acts within the scope of his powers if, while stopping at a place at which it is not customary to receive passengers, he grants permission to a passenger to temporarily leave the train.

Carriers—Injury to Passenger—Contributory Negligence—Boarding Moving Car.†—It is not negligence as a matter of law for a person to attempt to board a moving car in the absence of special circumstances, such as infirmity, or being incumbered with articles, or the speed of the train.

Negligence—Acts Constituting Negligence—Willful, Wanton, or Reckless Acts.—Wanton or willful misconduct of a carrier's servants can only be predicated on actual knowledge, as distinguished from a mere breach of duty that, had it been observed, would have led to knowledge, on the part of the servants of the peril of the person injured, or that from reasonable appearance such person would probably be imperiled by the action which the servant was about to take.

Carriers—Injury to Passenger—Willful or Wanton Negligence—Evidence.—Actual knowledge by a carrier's servants of the peril of a passenger, sufficient to render the carrier guilty of wanton negli-

board car, find a seat, or alight, see foot-note of Birmingham, etc., Co. v. Hawkins (Ala.), 27 R. R. R. 689, 50 Am. & Eng. R. Cas., N. S., 689, where all those preceding it are collected; second head-note of Sandlin v. Lexington Ry. Co. (Ky.), 30 R. R. R. 498, 53 Am. & Eng. R. Cas., N. S., 98; first foot-note of Heinze v. Interurban Ry. Co. (Iowa), 30 R. R. R. 330, 53 Am. & Eng. R. Cas., N. S., 330; sixth head-note of Birmingham, etc., Co. v. Lee' (Ala.), 30 R. R. R. 132, 53 Am. & Eng. R. Cas., N. S., 132; fifth head-note of Howard v. Louisville R. Co. (Ky.), 30 R. R. R. 116, 53 Am. & Eng. R. Cas., N. S., 116; Sawvan v. Citizens' Elec. St. Ry. Co. (Mass.), 30 R. R. R. 108, 53 Am. & Eng. R. Cas., N. S., 108; second head-note of Farrell v. Citizens' L. & Ry. Co. (Iowa), 29 R. R. R. 302, 52 Am. & Eng. R. Cas., N. S., 302.

†See third foot-note of Lexington Ry. Co. v. Herring (Ky.), 25 R. R. R. 635, 48 Am. & Eng. R. Cas., N. S., 635, where all the authorities in this series on the question, preceding it, are collected; first foot-note of Birmingham, etc., Co. v. Lee (Ala.), 30 R. R. R. 132, 53 Am. & Eng. R. Cas., N. S., 132.

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gence, so as to excuse contributory negligence, need not be positively and directly shown, but may be proved by circumstances from which such knowledge is a legitimate inference.

Trial—Questions for Jury—Sufficiency of Evidence.—The weight and credibility of evidence is a question for the jury.

Carriers—Injury to Passenger—Question for Jury.—Evidence in an action against a carrier for injuries to a passenger held sufficient to make the question of the wanton conduct of defendant's servants excusing contributory negligence, one for the jury.

Witnesses—Interpreters.—An interpreter is a witness, for the purpose of interpreting the testimony of other witnesses.

Oath—Nature and Function.—An oath is a solemn adjuration to God to punish the affiant if he swears falsely, and its sanction is a belief that the Supreme Being will punish falsehood.

Witnesses—Question for Jury—Competency of Witness.—The competency of a person to take the oath prescribed to become a witness is a question for the court.

Witnesses—Burden of Proof—Competency of Witness.—The burden of proving the incompetency of a witness rests upon the party objecting to the witness.

Trial—Instructions—Correcting Previous Instructions.—An instruction which, if standing alone, is erroneous, is rendered harmless, if, when considered with other instructions and as explained by them, it is corrected.

Carriers—Injury to Passenger—Instructions.—In an action against a carrier for injuries received while plaintiff was attempting to board a car, there was evidence that plaintiff tried to catch the first car, and was injured by the last car catching his leg. Held, that a request to charge that plaintiff cannot recover unless the jury are satisfied that, when the train was signaled to go forward, plaintiff was in the act of boarding the car and was injured by the train starting while he was in that position, was properly refused as disregarding the inference from the evidence that the car was in motion when plaintiff undertook to board it, and as disregarding the duty resting on the conductor to know before causing the train to be started that plaintiff was not in the act of getting aboard thereof, provided that permission had been granted to plaintiff to leave the car temporarily, as claimed by him.

Appeal and Error—Presumptions.—The appellate court will not presume that the jury's conclusion as to issues of fact is opposed to the weight of evidence.

Appeal from City Court of Birmingham; C. W. FERGUSON, Judge.

Action by Hendry Jung against the Birmingham Railway, Light & Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The original first count was in the following language:

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"Plaintiff claims of the defendant, a body corporate doing business as a common carrier of passengers for hire in Jefferson county, Ala., \$30,000 damages, for this: That on, to wit, January 10, 1904, plaintiff, while a passenger of defendant en route from Bessemer, in Jefferson county, state of Alabama, to Birmingham, in said state and county, was injured, in said state and county, as follows: Plaintiff's left knee was crushed, and his left leg crushed and mangled, thereby necessitating amputation at the knee joint, inflicting upon plaintiff excruciating physical and mental pain, suffering, and agony, causing plaintiff to endure for the remainder of his natural life great inconvenience and mental disquietude, and permanently rendering plaintiff less able to earn a livelihood. Plaintiff avers said injuries to have been caused proximately by the negligence of defendant in and about carrying plaintiff as a passenger, all to plaintiff's damages as aforesaid." The amended counts 2 and 3 are as follows: Count 2: Same as count 1, down to and including the words "less able to earn a livelihood," with this added averment: "Plaintiff avers said injuries to have been proximately caused by the negligence of the servant or agent of defendant while acting within the line and scope of his employment in and about the carriage of plaintiff as a passenger of defendant." Count 3: Same as 1, through the allegation of injury, with the added averment that "said injuries were proximately caused by the wanton, willful, or intentional conduct of the defendant's servants or agents while acting within the line and scope of their employment in and about the carriage of plaintiff as a passenger of defendant, which willful, wanton, or intentional conduct consisted in this: The servant or agent aforesaid wantonly, willfully, or intentionally caused a car to be set in motion, with the knowledge that plaintiff would probably be injured thereby, and with reckless disregard of the consequences."

Demurrers raised the points that the allegations of the count are vague, uncertain, and indefinite, and that no facts are averred showing wherein or how the defendant is guilty of negligence in and about carrying plaintiff as a passenger, and that the averments of negligence are too general to put defendant on notice.

The following portion of the oral charge was excepted to: That noted in assignment 7 is as follows: "If, however, you are reasonably satisfied from the evidence in the case that he got off the car without the consent or permission of the conductor, and was in the act of boarding it, and attempting to board it, and the conductor, with the degree of reckless indifference that would be the equivalent of a willful or intentional injury, started the car, and he was injured, and that was the proximate cause of his injury, then the plea of contributory negligence would not be an answer to that phase of the case." In assignment 8: "Now, there are two or three theories of law, gentlemen, that

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arise at this juncture of the case, by which plaintiff may recover, if you are reasonably satisfied that he is entitled to recover in any aspect of the case, and that law is that, even if that car was not stopped there for the purpose of allowing passengers to get on or off—that is, if it was stopped there for meeting and allowing another car to pass—and if you are reasonably satisfied that the conductor did allow him to get off for the purpose I have spoken about, why then it would have been (if the conductor knew it, it would have been) the duty of the conductor to give him a reasonable opportunity to get on the car again, and it would have been the duty of the conductor to see and know that he was not in the act of boarding the car before moving it, and it would have been his duty to see and know that he was not in a position of peril in attempting to board the car before moving it.” In assignment 9: “If you are reasonably satisfied that the conductor did allow him to get off for that purpose, and if you are reasonably satisfied the conductor did not give him a reasonable opportunity to get back, and if you are reasonably satisfied that while plaintiff was in the act of boarding the car that he signaled it forward, and it did move forward while he was in the act of boarding it, why the plaintiff would be entitled to recover on the theory of simple negligence.”

The following charges were refused to the defendant: (1) “I charge you that there is no evidence in this case that the defendant’s conductor knew that the plaintiff was boarding the car, if you believe that he was in that position.” (2) “I charge you that the plaintiff cannot recover in this case, unless each member of the jury is reasonably satisfied from the evidence that when the train was signaled to go forward, and actually started forward, the plaintiff was in the act of boarding the car, and was injured by reason of the train starting while he was in that position.” (3) Affirmative charge as to the first count. (4) Affirmative charge as to the third count. (5) Affirmative charge as to the second count. (6) “I charge you, gentlemen of the jury, that you cannot find for the plaintiff unless you and each of you are reasonably satisfied from the evidence that the conductor knew that the plaintiff was in the act of boarding the train when he signaled it to go forward.” (7) “If the plaintiff attempted to board the train while it was in motion, then I charge you that he cannot recover.” (8) “Under the facts in this case, the law does not impose the duty upon the conductor of seeing and knowing that the plaintiff was not in a position of peril before starting the train.” (9) “You cannot find a verdict for the plaintiff unless you and each of you are reasonably satisfied from the evidence that when the car started the plaintiff was in the act of boarding the car.”

There was judgment for the plaintiff in the sum of \$2,925.

*Birmingham Ry., Light & P. Co. v. Jung**Tillman, Bradley & Morrow*, for appellant.*Denson & Denson*, for appellee.

MCCLELLAN, J. The complaint, after amendment, contained four counts, the last of which was removed from consideration of the jury by instruction of the court. The original first count is in case, and those added by amendment are also in case, thus distinguishing the pleading in this action from that considered and treated in *Freeman v. Central of Ga. R. R.* (Ala.) 45 South. 898, where the departure attempted was from trespass to case. The amendment here was properly allowed, and had relation back to the commencement of the suit. *Highland A. & B. R. R. v. Sampson*, 112 Ala. 425, 20 South. 566.

The first three counts of the complaint were sufficiently definite in averments of culpable negligence, under our repeatedly declared rule. The pleas were the general issue and contributory negligence; but, of course, the latter defense was not available against the charge of willful or wanton misconduct producing the injury.

The plaintiff took passage on the interurban cars of the defendant from Bessemer to Birmingham. These cars traversed a distance of about 15 miles between the two cities, but were without closets for the convenience of passengers. The plaintiff, who was the only witness testifying to the circumstances of the injury itself, thus described it: "The car was stopped there; had stopped at the time he got off; went to get back on the car, and had one foot on the steps and one foot on the ground, and his hand on the car handle, and the bell rung, and the car run, and the last car caught his leg, the colored people's car. He was riding in the first car. He tried to catch the first car, and the last car caught his leg. He tried to get on the back end of the first car." The conductor testified that he knew nothing of the plaintiff's desire or intention to leave the car, nor of his leaving it, nor that he knew anything of the injury until some time afterwards. There was testimony for the plaintiff tending to corroborate him in the respect that he sought and secured the consent of the conductor to leave the then stationary car to urinate.

It was shown, without conflict, that the car in question had taken this siding for the purpose of permitting an opposing train to pass, and that this place was not a regular or scheduled station for the reception and discharge of passengers, unless as appellee contends, the custom or usage, stated by the conductor, which we will set out later, brought this place within the class defined, raising the duty thus declared in *North Birmingham R. R. v. Liddicoat*, 99 Ala. 545, 549, 13 South. 18, 19: "If, however, a carrier is in the habit of receiving or discharging passengers at a place other than a regular station, * * * they

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have the right to presume that it is safe to board or quit the train at such place, unless the risk in doing so is so obvious that a man of ordinary care and prudence would not, under like circumstances, make the attempt. * * * It is immaterial for what purpose its cars are stopped at such place, other than a regular station, whether in consequence of a duty enjoined on it by law, as when approaching the track of an intersecting road, or arising from convenience or necessity in the usual mode of operating its trains. If the public are in the habit of entering or quitting its cars at such place, without objection from its agents or servants, such persons are entitled to the protection of all the duties imposed upon the carrier in receiving and discharging passengers at its regular station, except in so far as it may be relieved therefrom by obvious risks, incident to the nature and condition of such place of customary use."

The testimony, to which we referred above in this connection, was that "people sometimes get on the car at that place, if they are there when the car stops; but passengers do not come there and wait for cars. It is a very rough place. I have been running there seven years, and maybe I have seen a half dozen people in that seven years get on at that place. The cars do not stop for them there. If the cars are on schedule time, they do not stop at all. They stopped on this occasion two or three minutes. When it stops, and people are quick enough to get on before it starts, they get on it, if they should happen to be coming along the track. Passengers get on there if they are there when the car stops. * * *" Upon the evidence presented by this record, pretermitted for the present consideration of the asserted contributory negligence of the plaintiff, the plaintiff was entitled to have submitted to the jury the two issues growing out of two theories leading to possible recovery for the injury suffered:

First. If the theretofore existing relation of passenger and carrier had been terminated by the departure of the plaintiff from the car, for the breach of duty in starting the cars in question while plaintiff was in the act of boarding the car at a place whereat it was customary for persons to take passage on defendant's cars, as defined in Liddicoat's Case, *supra*, the duty at such place embracing the obligation to exercise due care and prudence to see and know, before moving the cars, that no person was in the act of boarding the same at that place. H., A. & B. R. R. v. Burt, 92 Ala. 291, 9 South. 410, 13 L. R. A. 95. Second. If such place was not one whereat it was customary to receive passengers, within the rule declared in the Liddicoat Case, *supra*, then, for the breach of the duty raised by the consent of the conductor in permitting the plaintiff to temporarily leave the stationary car for the purpose before stated. This duty also embraced the obligation on the part of the servants

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or employees of the defendant, in charge of the cars, to exercise due care and prudence to see and know, before moving the car, that this plaintiff was not in the act of re-entering the car or "otherwise in a position which would be rendered perilous by a movement of the car." *H. A. & B. R. R. v. Burt, supra*; *Sweet v. B. R. & E. Co.*, 136 Ala. 166, 33 South. 886. In either event, if the jury affirmatively, to the requisite degree, so concludes from the whole testimony before them, and the injury was the proximate consequence of negligence in either form, the plaintiff was due a recovery. On the contrary, if the jury found that such place was not, by custom, brought within the rule announced in *Liddicoat's Case, supra*, then the duty existing toward persons intending *bona fide* to become passengers at a proper place for taking the cars did not obtain, to require the care and prudence defined with respect to the obligation to see and know, before moving the cars, that no person was in the situation mentioned in *H. A. & B. R. R. v. Burt, supra*; and hence no breach of duty toward this plaintiff, unless the servant or agent directing the movement of the car, and before or at the time of so doing, knew of plaintiff's perilous position, or knew that by such movement of the car his position would probably be rendered perilous.

With respect to the first theory, as we number them, leading to alleged liability, it is seen that, even if the plaintiff in leaving the car ceased to be a passenger, or severed the relation, the duty stated, if the place was one at which persons customarily entered the cars of the defendant when they stopped there, required the observance of the care and prudence before mentioned, regardless of whether the conductor consented to or knew of the departure of the plaintiff. With regard to the second theory of asserted liability, the legal inquiry presented involves the question whether, if the conductor consented to the temporary departure, implying an intention and understanding that a re-entry of the then stationary conveyance would be attempted, the relation of passenger and carrier was wholly terminated. Necessarily it was not terminated if the conductor was, under the circumstances, authorized by the general powers possessed by him, for the carrier, to bind the carrier by so consenting to a continuance of the relation existing at the time such consent was given. If such consenting was within the general scope of the conductor's authority, obviously the correlative duty prevailed to bring to the performance of his duty with respect to the starting of the train that degree of care and prudence in the movement of the cars owed to passengers temporarily absenting themselves from the conveyance at regular stations, for proper purposes, in re-entering the conveyance. Of course, we must not be understood as declaring the duty *vel non*, or its extent, while the passenger is absent from the train, but to announce that, given the consent by an authorized

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agent, in control of the train, that a passenger temporarily leave a stationary train, and implying the resumption of his place therein, the duty is the same as at a regular station, where, for instance, passengers customarily absent themselves without objection of the carrier, to observe the highest degree of care the situation and circumstances will permit to see and know that such passenger is not, before the train is started, in the act of boarding it, or in a position which would be rendered perilous by a starting of the cars. In temporarily leaving the car at the regular places we have referred to the passenger remains such, certainly and in all cases of that character, for the purpose and to the extent of raising the duty on the servants of the carrier to exercise the care and prudence stated to see and know before starting the cars that such passenger is not in the position described.

The reason this duty obtains toward passengers already accepted at regular stations is that the carrier invites the passenger to leave the carriage for this probably necessary purpose, and to necessarily imply thereby that the return of the passenger to his place will be conserved in safety by a requisite diligence to note his position with regard to the train before moving it. That the reason wholesomely raises the duty is apparent. Assuming for the present the authority of a conductor to bind his master by consenting to, a temporary departure, for a necessary purpose at least, of a passenger from the train at a place not a regular station by schedule or custom, we can see no distinction in principle between the duty stated towards passengers in reference to moving the train at a regular station, and where it is, for a purpose other than to accept or discharge passengers, stopped. In both, the invitation and implied assurance of the declared care for a return of the passenger are the same. In one, the invitation and implication are general. In practice, in the other, they are specific, sought, are extended, and acted on as upon an occasion. In each, the carrier induces the action of the passenger; and in each, it would be alike unreasonable, unjust, and in qualification of the high duty due a passenger from the carrier, to acquit carrier's representatives of obligation to observe all the care and prudence the situation would reasonably permit in conservation of the passenger's safety from the moving of the car. We are aware of no authority in point here, but the conclusion reached is sustained, we think, in the principle, invoked in analogy, illustrated in the following authorities and those therein cited: *C. R. & P. R. R. v. Sattler*, 64 Neb. 636, 90 N. W. 649, 57 L. R. A. 890, 97 Am. St. Rep. 666; *M. P. R. R. v. Foreman*, 73 Tex. 311, 11 S. W. 326, 15 Am. St. Rep. 785; *Frost v. Grand Trunk R. R.*, 10 Allen (Mass.) 387, 87 Am. Dec. 668; *Sweet v. B. R. & E. Co.*, 136 Ala. 166, 33 South. 886; *Lemery v. G. N. R. R.*, 83 Minn. 47, 85 N. W.

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908; *Patterson v. O., C. & B. R. R.*, 90 Iowa, 247, 57 N. W. 880; *Parsons v. N. Y. R. R.*, 113 N. Y. 355, 21 N. E. 145, 3 L. R. A. 583, 10 Am. St. Rep. 450; *Galveston Ry. v. Mathes* (Tex. Civ. App.), 73 S. W. 411; *Ala. R. R. v. Coggins*, 88 Fed. 455, 32 C. C. A. 1; *Montgomery R. R. Co. v. Stewart*, 91 Ala. 421, 8 South. 708; *Watson v. Oxanna Co.*, 92 Ala. 320, 8 South. 770; 6 Cyc., p. 617, note 75; *Abbot v. Oregon R. R.*, 46 Or. 549, 80 Pac. 1012, 1 L. R. A. (N. S.) 851, 114 Am. St. Rep. 885.

There can be, we think, no serious questioning of the conductor's power to raise the duty declared with respect to care for the re-entry of the passenger. He is the representative of the carrier in charge of the train. He controls the operation thereof. He is the highest officer on the train with whom the passenger may deal. His duties with reference to the comfort and safety of the passengers are multiform. In a large sense he is the guardian of the safety of his passengers. Presumptively this train could not properly move without his order. In emergencies he has extended powers and duties correlative therewith. The cars were without closets, and, according to the evidence adduced for him, the plaintiff decided to leave the stationary car for a purpose of natural necessity, and he sought the permission of the conductor to step aside, stating the reason to him, and the consent was given. In *Sweet v. Railroad*, *supra*, and in *Montgomery R. R. v. Stewart*, *supra*, the operation of the train by the agents or servants of the defending carriers was pronounced sufficient to predicate a breach of duty to liability. Much stronger must be the care when the express assurance of the conductor has led the passenger to a course of conduct out of which the injury grows.

The defense of contributory negligence was, on the state of evidence shown by this record, an issue for the jury, since, if it should be found, from the testimony, as it might have been by the jury, that the plaintiff undertook to board the car while it was moving, it is well settled that in the absence of special circumstances, such as the party's infirmity, or being incumbered with articles, or the speed of the train, it cannot, as a matter of law, be said to be negligence in one to attempt to board a moving train. The general rules in this regard have been so often stated by this court that there is no occasion to elaborate them.

Count 3 ascribes the plaintiff's injury to the wanton or willful misconduct of the defendant's agents or servants. Charge 4, refused to defendant, affirmed that, under the evidence before the jury, if believed, there could be no recovery on the third count. To warrant the submission to the jury of the issue presented by the third count, it was essential that there be introduced testimony tending to show knowledge, as distinguished from a mere breach of duty that, had it been observed, and not breached, would have led to knowledge, on the part of the dere-

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lict agent or servant, of the peril of the party injured, or that, from reasonable appearances, he would probably be imperiled by the action to be or that was taken. It cannot be that a willfulness or wantonness accompany an act—give it character—unless there be brought to the party charged with committing the wrong knowledge of the danger present or impending to the other party. We understand this to be the rule repeatedly announced by this court and not controverted by appellee here. See 5 May. Dig. pp. 711-714. That this knowledge, as a predicate for the imputation of the aggravated wrong pleaded in the third count, may be shown, and becomes thereby a jury question, as any other fact from which knowledge may be reasonably inferable, is thus declared in *Southern Ry. v. Bush*, 122 Ala. 487, 26 South. 173: "While wantonness on the part of an engineer cannot be predicated on the mere fact that he ought to have seen the deceased on the trestle, or anything short of actual knowledge, yet his actual knowledge need not be positively and directly shown, but, like any other fact, may be proved by showing circumstances from which the fact of actual knowledge is a legitimate inference. Otherwise, in cases of this character, this fact could never be proved, except by the testimony of the engineer himself." The court, following the appropriated expression, enumerated the facts and circumstances upon which it pronounced. They were that the track was straight and unobstructed in view for a long distance, and that the engineer was in his seat looking ahead along the track, and that there was nothing to hinder his sight of a person on the track a few hundred feet ahead. It was said, in caution, that these facts and circumstances might warrant the jury in inferring the fact of actual knowledge on the part of the engineer, but from them there was no presumption that he did see Ora Bush on the track. It further appeared from the testimony that the party was on the track.

Originally, the opinion was entertained that there was an entire want of evidence, or reasonable inference, fairly leading, in any aspect of the case, to the conclusion that plaintiff's injury was traceable, in proximate cause, to wanton or intentional misconduct on the part of the conductor in signaling the starting of the car; the reason being that no such actual knowledge of plaintiff's then position of peril within the stated rule, in such cases, was shown to have been possessed by the conductor. This conclusion necessarily resulted in the reversal of the judgment because of the failure of the court to give charge 4. On further consideration, invited by application for rehearing on this feature of our ruling, the error of this conclusion appears, and the opportunity to now correct it is welcomed. The inquiry, under the third count, was properly submitted to the jury, and the *Burt Case*, *supra*, affords authority for the conclusion. The

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testimony of the plaintiff has been before quoted. "That, in part, of the conductor will suffice to show the ground on which our later conclusion is based. He testified: "* * * I signaled my car ahead. I was then on the back platform of the motor car, and *there was no one in sight at that time*. Every one seemed to be on the car, and every one was perfectly quiet. I did not see any of the passengers trying to get back on, and did not know that any passengers had gotten off. I had to stand in about 24 inches of the right-hand side of the platform to ring the bell, and the car was lighted. * * * "(Italics supplied.) We are not, of course, on this phase of the case, concerned with the weight and credibility of the evidence. That, under all the issues raised by the three first counts and the pleas thereto, was for the jury.

The quoted testimony of the conductor, especially the feature of it italicized by us, shows his favorable position, at the time of giving the signal, to see plaintiff, and his situation with respect to his peril *vel non*. If plaintiff's testimony, in one aspect, is credited, he was then (at the time the signal was given) in the act of boarding the car, within a very short distance of the conductor. The conductor states that there was no one in sight when he gave the signal. The affirmation of this asserted fact necessarily justifies the inference, possible to be drawn by the jury, that he looked. There is no escape from the possible and very rational impression, from this statement of fact, by the party concerned himself, that he could and did survey the rear of the car, and there was no one there, and so, notwithstanding other phases of his testimony, tended to refute this inference, or to deny the circumstances as the plaintiff detailed them. Besides, on cross-examination, the conductor said: "* * * From the conductor's position on the back platform, I can see the back end of the car and have a full view of it, standing right there over it, right by it. * * *" If the jury, as they might have done, concluded that the conductor saw the plaintiff's situation, as the plaintiff asserted it was, when he signaled the starting of the car, then the next condition to the imputation of wanton or willful misconduct to the conductor in his said act of signaling the starting of the car was likewise a jury question, under all the facts and circumstances of the event. We therefore hold that there was no error in refusing charge 4, requested by the defendant.

Several of the assignments of error relate to the competency, on account of religious belief and training, of the plaintiff, of Charlie June Forg, and of Jung Lum to take the oath essential to qualify as a witness in this state. All are Chinese. Forg was presented as an interpreter for the plaintiff. Code 1896, §1793. An interpreter is a witness for the purpose indicated by the descriptive word. *People v. Lem Deo*, 132 Cal. 199, 64 Pac. 265. In *Blocker v. Burness*, 2 Ala. 354, the attitude of this court on the

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subject in hand was thus early delivered: "An oath is a solemn adjuration to God to punish the affiant if he swears falsely. The sanction of the oath is a belief that the Supreme Being will punish falsehood; and whether that punishment is administered by remorse or conscience, or in any other mode in this world, or is reserved for the future state of being, cannot affect the question, as the sum of the matter is a belief that God is the avenger of falsehood." See *Beeson v. Moore*, 132 Ala. 391, 31 South. 456. The competency of a person to take the prescribed oath, to become a witness, is, of course, a question for the court; and upon the objector to competency rests the burden to sustain it. 1 Green. Ev. §§ 369, 370. The examinations, *voir dire*, of witnesses, was elaborate; counsel for both sides and the court propounding many questions. The court resolved the matter against the objector (defendant). We cannot set out the responses on these examinations. They would consume too much space. We must be content with this statement and ruling, based upon a careful consideration of the record in this regard: That while these persons evinced, in some particulars, crude and perhaps absurd ideas with respect to their belief of the source of the Godhead, they gave, in general, unmistakable evidence of a belief in the existence of the Godhead and that God was the "avenger of falsehood." On the whole, we cannot pronounce the ruling of the court below, holding these persons to be competent to take the oath, to have been erroneous.

Coming to the assignments based on the oral charge of the court and of the special charges refused to the defendant: We find no merit in any of these assignments. Three of them assail the oral charge. Those portions of the oral charge set out in assignments 8 and 9 are justified in correctness by what we have said in the general treatment of the law of the case. That portion of the oral charge set out in assignment 7 might be subject to criticism, if considered disassociated from that part of the oral charge, appearing in this record, wherein wanton or intentional misconduct was described; but when considered in that connection, and as thereby explained, no error was committed.

Special charges 1, 3, 4, 5, 6, 7, and 8 were properly refused to defendant under the view of the law of the case stated before.

Special charges 2 and 9 sought to hinge the right of recovery upon the hypothesized fact that the car was entirely stationary at the time plaintiff undertook to board it. From that phase of the plaintiff's testimony, where in he says "he tried to catch the first car, and the last car caught his leg," it was open to inference by the jury that the car was in motion when he undertook to board it. These charges pretermitt the effect of the stated inference, if drawn, as might have been done by the jury. Besides, they pretermitt the duty resting on the conductor to see and know, before causing the train to be started, that plaintiff was not in the act of

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getting aboard thereof, provided the jury found that permission to temporarily leave the car, for the purpose stated before, had been given plaintiff by the conductor. The motion for a new trial was in consequence properly overruled. The issues of fact were for the jury, and we cannot presume their conclusion palpably opposed to the evidence or its weight.

We are of opinion that there is no error in the record, and the judgment is therefore affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON, ANDERSON, MAYFIELD, and SAYRE, JJ., concur.

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(Supreme Court of Appeals of Virginia, March 11, 1909.)

[63 S. E. Rep. 1018.]

Appeal and Error—Review—Harmless Error—Exclusion of Evidence.—In an action for assault of a passenger by a brakeman, the error, if any, in excluding evidence of plaintiff's intoxication before and at the time he boarded the train, is harmless, where it was fully shown by other evidence that he was intoxicated and so disorderly in conduct as to justify his removal from the train.

Assault and Battery—Provocation—Insulting Words.—Insulting words do not justify an assault and battery, though such words may be shown as extenuating the assault and in mitigation of damages.

Carriers—Disorderly Passengers—Duty of Carrier.*—Trainmen have the right to remove a disorderly passenger to such safe and convenient place as will prevent annoyance to other passengers or trainmen, to stop a train and eject a disorderly passenger therefrom, employing only such force as may be necessary in doing so, and to overcome any resistance which may be made by such disorderly passenger; but, if in so doing the trainmen commit unnecessary violence, the carrier is liable.

Carriers—Assault on Passenger.*—Where a brakeman without justification assaulted and injured a disorderly passenger after the latter had been removed to another car, the carrier is liable for the assault.

Carriers—Assault on Disorderly Passenger.—The movement by a disorderly passenger, who had been removed from the car, of his hand along his side to his hip pocket, did not justify the trainman in assaulting him, where such movement was accompanied by the statement, "I'll see you later."

Appeal from Circuit Court, Henry County.

Action for personal injuries by one Brame against the Norfolk

*See second foot-note of the second preceding case.

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& Western Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The court's instructions to jury:

"(A) The court instructs the jury that those in charge of a passenger train have the right to preserve order, remove disorderly passengers to such safe and convenient places as will prevent annoyance to passengers or trainmen, and even to stop the train and eject such disorderly persons therefrom; but in exercising such right those having charge of such train have only the right to employ such force as may be necessary to accomplish these ends and to overcome any resistance which may be made by such disorderly passengers. They have no right to commit unnecessary violence on an offending passenger, and if they do so their principal must answer in damages.

"(B) The court further instructs the jury that mere insulting words and epithets from an intoxicated passenger will not justify an assault by those in charge of a train, and will not release the carrier from liability for such assault; but insulting words and epithets which provoke an assault must be taken into consideration in mitigation of damages.

"(C) The court further instructs the jury that if they believe from the evidence that Brakeman Hite, acting under the authority of Conductor Johnson, carried the plaintiff into the smoking compartment because of turbulent conduct, and that while in said smoking compartment the said brakeman violently assaulted said Brame and broke his jawbone and choked him without any further misconduct on the part of said Brame, or without his doing anything which the brakeman could reasonably have construed into an effort or intent to draw a weapon or make an attack on himself, they must find for the plaintiff, and assess his damages at such figures as will compensate him for his physical and mental sufferings and physical injuries occasioned by such assault, not exceeding the amount of \$2,000, claimed in the declaration."

Instructions as given by the court from those asked for by defendant:

"(1) The jury are instructed that it is the duty of the Norfolk and Western Railway Company, and of the conductors and brakemen on its passenger trains, to use every reasonable means in their power for the comfort and peace of the orderly and well-behaved passengers on such trains, and to prevent profanity and vulgarity in their presence by drunken or disorderly persons, and that in the performance of such duties they not only have the right, but it is their duty, to use all reasonable means and necessary force to remove from a car in which there are orderly, peaceable, and well-behaved passengers, and especially ladies, any passenger who is drunk and acting in a disorderly, profane, or vulgar manner.

"(2) If the jury believe from the evidence that the plaintiff was

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upon defendant's train in a drunken condition, that he acted in a disorderly, vulgar, and profane manner, cursed the conductor and the brakeman, and entered into a car where a lady and several well-behaved passengers were traveling, and, while in such car, engaged in cursing and profanity, or talked in a loud and boisterous manner, it was the duty of the conductor and brakeman to remove him from the car, and it was their right to use all the force reasonably necessary therefor; that if they believe the conductor and brakeman did remove him by force from the body of the car into the smoking compartment, but used no more force than was reasonably necessary, the defendant company is not liable in damages for such removal. And if they believe that after he was so removed he did anything which reasonably caused the brakeman to believe that the plaintiff then and there intended to make an attack upon him with a weapon, or with his fists, the brakeman had the right to do what seemed reasonably to be necessary to protect himself against such apparently threatened attack, whether the same was real or not, provided he believed it was real, and for any injury done the plaintiff by the brakeman in using reasonable means to defend himself the defendant is not liable, and if the jury believe that only such means were used, and believe the other matters as supposed in this instruction, they should find for the defendant.

"(3) The jury are instructed that a brakeman or conductor on a railroad train has the same right to protect himself against an assault, or an actual or threatened injury, that any other person has, and that where a brakeman or conductor injures a person in an effort to protect himself, under such circumstances that such person could not recover damages of him, the railroad company is not liable to such persons for the acts of the conductor or brakeman.

"(4) If the jury would not find a verdict for the plaintiff upon the evidence in this case if he were suing the conductor and the brakeman, or either of them, for the injury complained of, they should find for the defendant."

Phlegar & Powell and *H. G. Mullins*, for appellant.

N. E. Smith and *Gravelly & Gravelly*, for appellee.

KEITH, P. This is a suit instituted by William J. Brame to recover damages from the Norfolk & Western Railway Company, on account of injuries received in consequence of an assault made upon him by a brakeman of that road, while a passenger upon one of its trains.

The evidence shows that Brame entered the train of the Norfolk & Western Railway Company in an intoxicated condition. As some of the witnesses express it, he was "violently drunk," and, some disagreement having arisen between himself and the conductor as to the payment of a cash fare, he not having pro-

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cured a ticket, he became very disorderly and abusive, using vulgar and profane language, and conducting himself in a manner most insulting to the officials of the train and offensive to its respectable passengers, one of whom was a lady. Thereupon the conductor directed the brakeman to remove him from the passenger coach into the smoker, which the brakeman proceeded to do; and while the plaintiff, in his testimony, says that in the process of his removal he was kicked and cuffed and much mishandled, we think it may be taken as established that no greater force was exercised than the occasion justified, until the brakeman, followed by the conductor and pushing Brame before him, carried him into the smoker, and there, as a passenger states who was in a position to see what occurred, Brame was thrown roughly into a seat. He was still very drunk, and seems to have made some movement of his hand, which the brakeman says he understood to be an effort to draw a weapon from his hip pocket. Whereupon the brakeman, who is shown to have been a very powerful, active young man, struck Brame upon the jaw, breaking it and loosening a tooth, grasped him by the throat, and called upon the conductor to search and disarm him. The conductor did search him, but found no weapon upon his person of any description. A disinterested passenger states that he saw Brame put his hand back toward his hip pocket and as far as his side pocket, "very slowly as if to go after his handkerchief, and said, 'I'll see you later,'" and that thereupon Hite, the brakeman, "turned and hit him and knocked him against the window sill, and Mr. Johnson searched him."

These are the material facts established by the testimony.

During the course of examination of the witnesses, several exceptions were taken to the rulings of the court, which are now assigned as error. The action of the court in granting and refusing instructions, and in overruling plaintiff in error's motion to set aside the verdict and grant a new trial, are also assigned as error.

The exceptions to the evidence are to the refusal of the court to permit the defendant to prove that plaintiff had been drinking before he entered the train, that when under the influence of liquor he was quarrelsome, and that he was so disorderly in the storeroom of a Mr. Penn during the afternoon of that day that he was requested to leave the store, and arrangements were made to expel him had he not voluntarily left. Another exception is to the action of the court in excluding proof that when the plaintiff applied for a ticket of the station agent he was refused upon the ground that he was too drunk to get on the train. Another exception is to the exclusion of the statement of the witness Reynolds that he got upon the train to collect a bill due him by Brame, whereas Brame had stated in his evidence that Reynolds had gotten upon the train at his invitation.

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If it were conceded that, with respect to one or more of these exceptions, the ruling of the court was erroneous, it would not be error for which the judgment complained of should be reversed. If Brame's condition upon the train left any room for controversy or question, it might be that his condition a short time before he entered the train would be of value in enabling the jury to reach a right conclusion as to his condition and his conduct while upon the train; but his own testimony shows, and there is no room to doubt, that he was very drunk, that he was disorderly in his conduct, abusive and insulting to the officers of the train, and used language so indecent and offensive to respectable passengers as justified his removal from the day coach. But the crisis of the situation is reached when, having removed him on account of his gross misconduct to the smoking compartment, the brakeman threw him roughly upon a seat and struck him a blow which inflicted upon him a serious injury. His removal was justified by his conduct. The company would have been within its rights if he had been ejected from the train; but the question is: Was the brakeman justified in making a violent assault upon him?

The abusive language used by Brame, while reprehensible, did not excuse the assault.

In section 704 of Bishop on Criminal Law, it is said: "No words, however provoking or insulting, or mere verbal threat, will so far justify a blow returned, though in actual passion, as to reduce the killing to the lower degree. It is plain, however, that words may give character to acts, and, in matter of evidence, are admissible to explain them. Hence, if there is a present demonstration of impending violence, which alone would be insufficient, accompanying words, added to the physical acts, may create such peril as will justify the killing of the aggressor, or reduce it to manslaughter."

As it is commonly stated, words do not justify blows, though doubtless insulting language may be shown as extenuating the assault and in mitigation of the damages sustained.

The turning point in this case is whether or not the insulting language was accompanied by any act to which the words used gave character, and which might reasonably have caused the brakeman to believe that the plaintiff then and there intended to make an attack upon him, in which case, of course, he would have had the right to protect himself against such apparently threatened attack, whether the same was real or not.

When we turn to the instructions, we find that they correctly propound the law as applied to the two conflicting views of the evidence presented on behalf of the plaintiff and the defendant.

The jury were told that those in charge of a passenger train have the right to preserve order, to remove disorderly passengers to such safe and convenient place as will prevent annoy-

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ance to passengers or trainmen, to stop a train and eject disorderly persons therefrom, employing only such force as may be necessary to accomplish these ends, and to overcome any resistance which may be made by such disorderly passengers; but that the officials of the train have no right to commit unnecessary violence, and if they do their principal must answer in damages, that insulting words and epithets from an intoxicated passenger will not justify an assault by those in charge of the train, but insulting words and epithets which provoke an assault must be taken into consideration in mitigation of damages, that a brakeman or conductor on a railroad train has the same right to protect himself against an assault or an actual or threatened injury that any other person has, that where a brakeman or conductor injures a person in an effort to protect himself, under such circumstances that such person could not recover damages of him, the railroad company is not liable to such person for the acts of the conductor or brakeman, and that if the jury would not find a verdict for the plaintiff, if he were suing the conductor and brakeman, or either of them, they must find for the defendant.

These principles are fully sustained by the authorities.

In *Hutchinson on Carriers* (3d Ed.), at section 1093, it is said: "The passenger is entitled not only to every precaution which can be used by the carrier for his personal safety, but also to respectful treatment from him and his servants. From the moment the relation commences, the passenger is, in a great measure, under the protection of the carrier, even from the violent conduct of other passengers, or of strangers who may be temporarily upon his conveyance. But as against the assaults and violence of his servants, the passenger has the right to claim an absolute protection, and the carrier will undoubtedly be held responsible for any unnecessary personal abuse or violence of which they may be guilty in their treatment of the passenger whilst engaged in the discharge of their assigned and appropriate duties, although such abuse may consist in an assault or battery upon the person of the passenger, and may be wholly unauthorized by the carrier and prompted by the vindictive feelings of the servant towards the passenger. And it is undoubtedly well-settled law that, when an assault or battery by the carrier's servant occurs upon the carrier's vehicle, the carrier may be held responsible even when the servant has seemingly departed from the line of his duty, and has committed the assault or the personal violence upon the passenger aside from and under circumstances wholly unconnected with the discharge of such duty."

And at section 1094 it is said: "Passengers on railroad trains are peculiarly under the control of the carrier's agents, and are practically helpless when compelled to defend themselves against their abuse or assaults. It is consequently necessary to hold

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a railroad company to a strict accountability for any acts of its servants on a train which tend to injure or humiliate the passenger, even though such acts may be malicious and unauthorized. This has been held to be true not only as to conductors, who are in charge of a train, but also as to brakemen."

We have held in *Norfolk & Western R. Co. v. Birchfield*, 105 Va. 809, 54 S. E. 879, that: "In case of a threatened assault upon a passenger by a fellow passenger, it is the duty of the company's employees to protect the party threatened from injury, and if they negligently fail to do so, the carrier is liable for the consequences. The conductor has the power, and it is his duty, to preserve order on the train; if necessary, stopping the train and calling to his assistance all the train employees and such passengers as are willing to assist him. Until, at least, he has put forth the forces at his disposal, he has no right to abandon the scene of conflict. In order that conductors may be clothed with authority commensurate with their duty, they are in this state made conservators of the peace by Code 1904, § 1294d, cl. 10."

If it be the duty of those in charge of a train to protect passengers from their fellow passengers, how much more is it their duty to exercise self-control and restraint in their own conduct. If mere words will not justify an assault as between those who stand upon a footing of equality and owe no special duty one to the other, how much more true is it as between those in charge of a train and a passenger, who is in a large degree under the control of the carrier's agents, and entitled at their hands to respectful treatment and to protection from all injury. The conduct of a passenger may be exasperating, as it doubtless was in this case. It may render it difficult for the agent of the carrier properly to discharge his duty. But this does not excuse or justify his failure to perform it.

Being of opinion that there is no reversible error with respect to the admission or exclusion of testimony, and that the law of the case was properly placed before the jury, it remains to be considered whether or not the verdict is contrary to the evidence.

As we have said, the crisis of the case occurred when the brakeman roughly threw the plaintiff into a seat, after removing him from the day coach. We have seen that the insulting language used by the drunken passenger did not justify the assault, while it was proper for the consideration of the jury in mitigation of damages. The attention of the jury was drawn by the instructions to the two conflicting theories with respect to the evidence at the instant of the assault: Did the brakeman have a reasonable ground to expect that the plaintiff was about to make an attack upon him? The evidence shows: That the plaintiff was almost helplessly drunk; that the brakeman, a powerful young man, had without difficulty removed him from one car to

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another, and placed him roughly in a seat. There is evidence of a movement of the hand on the part of the plaintiff to his side or hip pocket, but it was accompanied by the statement, "I'll see you later," which would not indicate a present purpose to make an assault. The jury, with their minds specifically drawn to the precise point in issue, were of opinion that the brakeman had no reasonable ground to anticipate an attack upon him, and rendered a verdict in favor of the plaintiff, which the court refused to set aside, and we are of opinion that its judgment should be affirmed. Affirmed.

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(Supreme Court of Illinois, April 23, 1909.)

[88 N. E. Rep. 223.]

Carriers—Street Railroads—Duty as to Passengers—Acts or Omissions of Employees—Personal Violence and Abusive Language.*—A street railroad company, while not an insurer of its passengers against injury on its cars, is bound to protect them from the violence and insults not only of strangers, but also of its own employees.

Evidence—"Res Gestæ"—Definition.—The *res gestæ* are those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act.

Evidence—"Res Gestæ."—While a narrative of past events cannot be introduced as part of the *res gestæ*, continuousness is not always measured by time; the true inquiry being whether the declaration is a verbal act, illustrating or explaining other parts of the transaction

*For the authorities in this series on the subject of the duty of a railroad to protect its passengers against the violence of strangers, see foot-note appended to *Dufur v. Boston & M. R. Co.* (Vt.), 9 R. R. R. 711, 32 Am. & Eng. R. Cas., N. S., 711, where all those preceding it are collected; second foot-note of *Taylor v. Atlantic Coast Line R. Co.* (S. Car.), 28 R. R. R. 774, 51 Am. & Eng. R. Cas., N. S., 774; last foot-note of *McCollum v. Southern Pac. Co.* (Utah), 26 R. R. R. 265, 49 Am. & Eng. R. Cas., N. S., 265.

For the authorities in this series on the subject of the duty of a railroad to protect its passengers against other passengers, see first foot-note of *Anderson v. South Carolina & C. R. Co.* (S. Car.), 30 R. R. R. 503, 53 Am. & Eng. R. Cas., N. S., 503, where all those preceding it are collected or referred to.

For the authorities in this series on the subject of the liability of the carrier for assaults on its passengers by its employees, see second foot-note of the second preceding case.

For the authorities in this series on the subject of the liability of a railroad company for insults by employees to passengers, see monograph appended to *San Antonio Traction Co. v. Crawford* (Tex. Civ. App.), 5 R. R. R. 517, 28 Am. & Eng. R. Cas., N. S., 517; foot-note of *Carleton v. Central of Ga. Ry. Co.* (Ala.), 30 R. R. R. 269, 53 Am. & Eng. R. Cas., N. S., 269.

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of which itself is a part, or is merely a history or part of a history of a completed past affair.

Evidence—Res Gestæ.—In an action against a street railroad for injuries to a passenger in a scuffle between a conductor and plaintiff's husband arising out of a dispute as to transfers, evidence as to the dispute and of the conversations between all three parties was admissible as part of the *res gestæ*.

Appeal and Error—Preservation of Grounds of Review.—Where, though a question was objected to, no motion was made to exclude an irresponsive answer thereto, the point that the evidence was inadmissible could not be raised on appeal.

Appeal and Error—Review—Harmless Error—Evidence.—In an action for personal injuries, error in admitting certain evidence as to plaintiff's physician's bill was harmless; the amount of the bill being remitted from the judgment.

Damages—Personal Injuries—Evidence.—In an action for personal injuries, a question asked plaintiff by defendant's counsel to show that plaintiff was out evenings, and directly engaged in occupations indicating that she was not as seriously hurt as she claimed, as to a dispute she had with her church about card playing, was properly excluded, as not bearing on the case.

Evidence—Opinion Evidence—Experts—Cross-Examination—Interest of Witness—Discretion of Trial Court.—While cross-examination of an expert witness lies largely within the discretion of the trial court, such examination of defendant street railroad's expert medical witness in an action for personal injuries as to how many cases he had testified in as an expert for street railroads should have been limited to the number of times he had testified for defendant.

Evidence—Experts—Cross-Examination.—The weight to be accorded to the opinion of an expert witness depending largely on his means of knowledge, as well as his bias and inclination or relation to the parties, it is always competent to show his interest.

Appeal and Error—Review—Harmless Error—Evidence.—In an action against a street railroad for personal injuries, error in permitting certain cross-examination of defendant's medical expert witness by which plaintiff sought to show that witness always testified for defendant corporations was not prejudicial; the witness testifying to the contrary.

Trial—Instructions—Repetition.—Requested instructions should be refused where substantially identical with instructions given.

Carriers—Injuries to Passengers—Instructions—Misleading Instructions.—In an action against a street railroad for injuries to plaintiff, a passenger, through being struck by defendant's conductor while the latter was scuffling with plaintiff's husband, an instruction that, if plaintiff could have avoided the injury by the exercise of ordinary, reasonable care, she could not recover, was properly refused as misleading; the only basis for the instruction being the argument that

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plaintiff should have kept her seat during the scuffle, and that she would not then have been injured.

Trial—Instructions—Application to Evidence.—Instructions not applicable to the evidence are improper.

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; A. H. CHETLAIN, Judge.

Action by Mary E. McMahon against the Chicago City Railway Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

Samuel S. Page and Watson J. Ferry (John R. Harrington, of counsel), for appellate.

Cunningham & Cunningham, for appellee.

CARTER, J. This is an action on the case to recover damages for personal injuries alleged to have been sustained by appellee while a passenger on one of appellant's electric street railway cars in Halsted street, near Forty-Eighth, in the city of Chicago. On a jury trial in the superior court of Cook county appellee recovered a judgment April 20, 1907, for \$1,850, from which amount the plaintiff remitted \$200, on a suggestion of the trial judge that he did not regard the proof as to the services of the physician, amounting to \$200, sufficient. The judgment was affirmed by the Appellate Court, and the case has been appealed to this court.

Sunday afternoon, August 23, 1903, appellee and her husband were passengers on a street car in Chicago operated by appellant. They had transfers from another line of the same company entitling them to ride. A dispute arose between the husband and the conductor of the car concerning further transfers, which lasted for some time, the testimony showing that the conductor renewed the controversy several times as he passed by them in the car, and also showing, without contradiction, that the conductor addressed vituperative, profane, and obscene language to them, and that the altercation finally culminated in a scuffle between the conductor and the husband; that the conductor started the scuffle by attempting to strike the husband; that when he was struggling in the grasp of some of the passengers who were trying to prevent him from making a physical assault on the husband his arm or elbow struck appellee and knocked her against the corner of the seat, and afterwards in the melee she was thrown over and seriously injured. At the time the conductor attempted to strike the husband appellee was sitting across the aisle from her husband. No attempt was made by appellant to contradict the main features of the evidence as to what started the affair or that appellee was injured thereby. The conductor and motor-man did not testify. Appellant by cross-examining witnesses of appellee and by the introduction of other testimony endeavored,

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however, to show that the injury was not as serious as contended.

Appellant was a common carrier of passengers; and, while not an insurer against any possible injury that passengers might receive while on its cars, it was bound not only to protect them from the violence and insults of strangers and co-passengers, but also from the violence and insults of its own servants. *Chicago & Eastern Railroad Co. v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33. "The carrier's obligation is to carry his passengers safely and properly and to treat him respectfully, and, if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obligated to protect his passenger from violence and insult from whatever source arising. * * * If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted through the negligence or the willful misconduct of the carrier's servant, the carrier is necessarily responsible." *Goddard v. Grand Trunk Railway Co.*, 57 Me. 202, 2 Am. Rep. 39. See, also, *Craker v. Chicago & Northwestern Railway Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Nieto v. Clark*, 1 Cliff. 145, Fed. Cas. No. 10,262.

Counsel for appellant do not seriously question that this is the measure of responsibility cast upon common carriers. They do, however, contend that the court committed such error on the trial as to require a reversal of this judgment. They first contend that the dispute and conversation over the transfers was not a part of the *res gestæ*, and was improperly admitted in evidence. The *res gestæ* have been defined as "those circumstances which are the undersigned incidents of a particular litigated act and which are admissible when illustrative of such act." 1 Wharton on Evidence, § 259. The "ground for the admissibility of such declarations is that they are the natural and spontaneous utterance of the declarant, so closely connected with the transaction in question as to be, in effect, a part of it, there having been no opportunity for premeditation or design." 1 Elliott on Evidence, § 538. A narrative of past events cannot be introduced as a part of the *res gestæ*. Continuousness, however, is not always to be measured by time. A transaction in which the parties are absorbed may last for weeks, so as to make what is said and done in connection with it part of the *res gestæ*. 1 Wharton on Evidence, § 261. This court has said that the true inquiry, according to all authorities, is whether the declaration is a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which itself is a part, or is merely a history or part of the history of a completed past affair. *Chicago West Division Railway Co. v. Becker*, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144; *Montag v. People*, 141 Ill. 75, 30 N. E. 337; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713;

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Lander v. People, 104 Ill. 248. The conversations between the conductor, appellee, and the husband were contemporaneous with the main fact—that is, the injury—and were properly admitted as a part of the *res gesta*.

The trouble with the conductor resulted in appellee, her husband, and a friend leaving the car immediately after the appellee was injured. This friend, Kelly, testified that after leaving the car he “invited the conductor off the car.” Counsel insist that this statement is not a part of the *res gesta*. It was made in response to a question asked by appellee’s counsel as to what the conductor said to them as they left the car. It was not responsive to that question; and, while the question was objected to, no motion was made to exclude the answer. For that reason, even if Kelly’s remarks were not a part of the *res gesta*, the point, not having been properly preserved, cannot be raised here.

The further contention is made that the remittitur of \$200 by the trial court did not remedy the error arising from the improper admission of the testimony with reference to the physician’s bill. Counsel rely upon Jones & Adams Co. v. George, 227 Ill. 64, 81 N. E. 4, and McCarthy v. Spring Valley Coal Co., 232 Ill. 473, 83 N. E. 957, to support their contention. Those cases are clearly distinguishable. In those cases there was no possibility of showing to what extent the jury had been improperly influenced by the evidence in question in the first or by the improper remarks of counsel in the second, but the improper testimony in this case had to do only with the amount of the physician’s bill, which he stated was \$200. This amount was remitted. Manifestly the verdict could not have been more than \$200 larger because of this testimony. The error therefore, if any, was not prejudicial to appellant.

The further contention is made that the court improperly refused to allow appellee on cross-examination to answer this question in reference to a card game: “Instead of being in the church wasn’t it just the other way?—that the church got after you for running a game there and had you up for that?” Counsel argued that they were trying to show by this question that appellee was out evenings, and directly engaged in occupations that indicated she was not as seriously hurt as she claimed. The bearing on this case of a dispute she might have had with her church as to card playing cannot readily be seen. We think the court properly sustained the objection to the question.

Appellant further contends that the court improperly permitted one of its expert witnesses, Dr. Leaming, to be cross-examined as to how many cases he had testified in as an expert for the street car lines of Chicago. The extent of an examination along this line is largely within the discretion of the trial court. Shaughnessy v. Holt, 236 Ill. 485, 86 N. E. 256. No definite limit can be prescribed as a rule of law. 8 Ency. of Pl. & Pr.

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p. 768. The weight to be accorded to the opinion of an expert witness depends largely upon his means of information and knowledge, as well as his bias and inclination or relation to the parties. It is always competent to show the interest of the witness. *Kerfoot v. City of Chicago*, 195 Ill. 229, 63 N. E. 101. We think, however, that the question should have been limited to the number of times the witness had testified for appellant. *Chicago & Eastern Illinois Railroad Co. v. Schmitz*, 211 Ill. 446, 71 N. E. 1050; *Chicago City Railway Co. v. Smith*, 226 Ill. 178, 80 N. E. 716. The witness had already answered without objection that he had testified in some 15 cases as an expert in the preceding three months. This question sought to show in how many of these cases he had testified for street railway companies, and he answered 10; that in some of the 15 cases he testified for the plaintiff, and not for the defendant. Counsel for appellee was seeking to show by the cross-examination that the doctor always testified for defendant corporations. His answers showed the contrary, and hence could not have been hurtful to appellant.

One of the appellee's witnesses (Mrs. O'Connor) was asked: "Well, do you know of your own knowledge of any trouble she has had affecting her kidneys?" An objection to this question on the ground that no proper foundation had been laid was overruled, and her answer was: "Not before. I never heard of anything." The answer was not responsive to the question, but no motion was made to strike it out on that account. However, the objection is now made that the answer was hearsay. Mrs. O'Connor was cross-examined at great length, and her testimony shows that she was testifying from her own knowledge, and not from hearsay. While the answer might properly have been stricken out as not responsive, no such motion was made, and appellant is not now in a position to complain.

The appellant further insists that the court committed reversible error in giving several instructions for appellee that were duplicates or substantially identical with other instructions given for appellee. The court should have refused the instructions in question. *North American Restaurant v. McElligott*, 227 Ill. 317, 81 N. E. 388. These duplicate instructions were evidently given inadvertently by the court, but we cannot see how they prejudiced appellant.

The further contention is made that the court improperly refused instruction 34 for appellant, which stated, in substance, that the jury should not find for plaintiff if they believed she could have avoided the injury by the exercise of ordinary, reasonable care. The only basis for this instruction is the argument of counsel that appellee should have kept her seat during the scuffle, and then she would not have been injured. With this theory of the duty of appellee we cannot agree. We think such

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an instruction would have tended to mislead the jury, and was properly refused.

The refusal of an instruction with reference to an operation advised by appellee's physician was proper. It did not state a correct principle of law, and, in any event, was objectionable, as it did not apply to the evidence in the case, but referred to a proposed operation for a trouble which antedated the injury here in question.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

McKAIN v. BALTIMORE & O. R. CO.

(Supreme Court of Appeals of West Virginia, March 2, 1909.)

[64 S. E. Rep. 18.]

Carriers—Liability for Injuries to Passengers—Special Police Officer—"Public Officer."*—A special officer, appointed and commissioned by the Governor, at the instance of a railroad company, under the provisions of section 31, c. 145, Code 1899 (section 4281, Code 1906), and paid by such company for his services, is prima facie a public officer, for whose wrongful acts such company is not liable.

Carriers—Injuries to Passengers—Relation of Parties—Special Police Officer.*—If such an officer is engaged in special service for the company, such as guarding its property or enforcing obedience to its rules and regulations, and does a wrongful act for which the injured party is entitled to damages, and such act was within the scope of such service or employment, the company is liable as in the case of its regular employees, such as conductors and station masters.

Carriers—Injuries to Passengers—Relation of Parties—Special Police Officer.*—But the company is not liable for a false arrest, assault and battery, and malicious prosecution, not directed nor instigated by it, and founded upon an alleged breach of the peace at one of its stations, in no way affecting or involving, so far as the evidence discloses, any of its property, rights, or servants, nor growing out of any transaction between the plaintiff and the company, although the plaintiff was rightfully in the station having a ticket and awaiting the arrival of a train, and the alleged breach of the peace, arrest, and assault and battery occurred on the premises of the company.

Railroad Company Not Liable.—Evidence disclosing the facts and circumstances above stated, and nothing more, is insufficient to sustain a verdict against the railway company at whose instance the

*See foot-notes of second and fourth preceding cases.

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special officer was appointed, and by whom he was paid for his public services, and the trial court properly set it aside.

(Syllabus by the Court.)

Error to Circuit Court, Marion County.

Action by Charles J. McKain against the Baltimore & Ohio Railroad Company. There was a verdict for plaintiff, and, from an order setting the same aside and granting a new trial, he brings error. Affirmed.

Harry Shaw and *C. H. Leeds*, for plaintiff in error.

U. N. Arnett, Jr., and *John Bassel*, for defendant in error.

POFFENBARGER, J. Charles J. McKain complains of an order, made by the circuit court of Marion county, setting aside a verdict in his favor for \$300, and awarding the defendant, the Baltimore & Ohio Railroad Company, a new trial in the case. The action is for damages for false arrest and imprisonment and assault and battery, alleged to have been committed by the defendant through its agents, and refusal to carry and transport the plaintiff, as it had contracted to do by selling him a ticket. The arrest was predicated on an alleged assault committed at the Fairmont station of the defendant upon Mrs. J. H. Downey, wife of the special officer who made the arrest. The evidence bearing on the question of probable cause therefor is highly conflicting, and renders it one clearly proper for jury determination. The plaintiff denies having molested the lady in any way, and she, her husband, and another man stoutly assert the contrary, saying he rudely pushed or shoved her as he passed them, while they were standing and engaged in conversation. It is hardly necessary to say this made a case proper for jury determination, if the railway company is responsible for the acts done by Downey; the arrest, assault and battery, and imprisonment being regarded, agreeably to the finding of the jury, as having been inflicted without probable cause or justification. Downey was a special policeman, commissioned by the Governor of the state, by virtue of the authority vested in him by section 31 of chapter 145 of the Code of 1899 (Code 1906, § 4281), upon the application of the defendant, and employed and paid by it. He had qualified as such officer and filed a copy of his oath of office in the clerk's office of the county court of the county in which he made the arrest. His powers are thus defined in the section of the statute above named. "Every police officer appointed under the provisions of this act shall be a conservator of the peace within each county in which any part of said railroad may be situated, and in which such oath or a certified copy thereof shall have been filed with the clerk of the county court or other tribunal established in lieu thereof; and, in addition thereto, he

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shall possess and may exercise all the powers and authority, and shall be entitled to all the rights, privileges and immunities, within such counties, as are now, or may hereafter be, vested in or conferred upon the regularly elected or appointed constables of said county." The statute also authorizes any railroad company at whose instance such an appointment has been made to dispense with the services of the officer by filing a notice to that effect, and thereupon his powers "cease and determine."

The reported decisions indicate that statutes similar to ours, providing for the appointment of special police officers at the instance of corporations and payment by them for their services, have been passed in many of the states and construed by several of the courts. While no decision of this court deals with the identical questions presented, namely, the status of such an officer and the extent to which his employer is liable for his acts, the numerous decisions of other courts having persuasive authority with us render it comparatively easy to solve these questions. Such officers act in the opinion of the courts sometimes as servants of the company employing them, and sometimes as officers of the state. *Deck v. Balt. & O. R. R. Co.*, 100 Md. 168, 59 Atl. 650, 108 Am. St. Rep. 399; *Foster v. Grand Rapids Ry. Co.*, 140 Mich. 689, 104 N. W. 380; *Brill v. Eddy*, 115 Mo. 596, 22 S. W. 488; *Dickson v. Waldron*, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 24 L. R. A. 483, 488, 41 Am. St. Rep. 440; *Sharp v. Erie Ry. Co.*, 184 N. Y. 100, 76 N. E. 923, 6 Am. & Eng. Ann. Cas. 250; *Tyson v. Bauland Co.*, 186 N. Y. 397, 79 N. E. 3, 9 L. R. A. (N. S.) 267; *Healey v. Lothrop*, 171 Mass. 263, 50 N. E. 540; *Tucker v. Erie Ry. Co.*, 69 N. J. Law, 19, 54 Atl. 557; *Cordner v. Railway Co.*, 72 N. H. 413, 57 Atl. 234; *Thomas v. Can. Pac. R. R. Co.*, 14 Ont. L. Rep. 55, 8 Am. & Eng. Ann. Cas. 324; *Daniel v. Railroad Co.*, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455, 1 Am. & Eng. Ann. Cas. 718. The import of these decisions is that such appointees, although paid for all their services by the persons at whose instances they are appointed, are not servants of such persons in respect to all the acts they perform by virtue of their offices; but only in respect to services rendered the company, such as defending or preserving its property. The line of distinction, sometimes hard to recognize under the circumstances of the particular case, marks the point at which the act ceases to be one of service to the employer, and becomes one of vindication of public right or justice, the apprehension or punishment of a wrongdoer, not for the injury done to the employer, but to the public at large. Perhaps the clearest and best statement of it is that given by the eminent English Jurist Blackburn in *Allen v. London, etc., Ry. Co.*, L. R. 6 Q. B. 65, as frequently quoted by the American courts: "There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back and an

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act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property. It is done merely for the purpose of vindicating justice. And in this respect there is no difference between a railway company—which is a corporation—and a private individual. If the law were that the defendants are responsible for the act of their booking clerk in giving the plaintiff into custody on an unfounded charge, every shopkeeper in London would be answerable for any act done by a shopman left in his shop who chose to accuse a person of having attempted to plunder the shop, every merchant would be responsible for a similar act of his clerk, and every gentleman for the act of his butler or coachman." In order to make the employer liable he must have directed the injurious and wrongful act to be done. Thus in *Tolchester, etc., Co. v. Steinmeier*, 72 Md. 313, 20 Atl. 188, 8 L. R. A. 846, one of the earliest cases on the subject in this country, the court held as follows: "(1) That the defendant was not bound for the policeman's acts simply because he was appointed by the Governor at its nomination or request, and because it paid his salary. (2) That the act of the policeman was that of a state officer in the exercise of his common-law powers as such officer, and not executing the orders of the defendant. (3) That the act of arrest, to be effectually ratified by the defendant, must have been the act of its agent authorized to commit it." In *Tucker v. Erie Ry. Co.*, 69 N. J. Law, 19, 54 Atl. 557, the court held as follows: "In order to render a company responsible for an unwarranted arrest made by one of such policemen, and a subsequent malicious criminal prosecution by him, it is necessary to show that his action was instigated by the company or some of its officers or employees." In *Foster v. Grand Rapids Ry. Co.*, 140 Mich. 689, 104 N. W. 380, the following proposition is asserted: "Where a special deputy sheriff paid by a street railway company acts solely in his capacity as an officer in assaulting a passenger, and not by the direction of the conductor in charge of the car, the street railway company is not responsible for the act."

But the direction or instigation need not be in express terms. It suffices that the officer in the employment of a private person or corporation had implied authority or direction from the employer to do the act. In other words, if the act done was within the scope of the duty imposed upon him in favor of the employer by his contract of service, the principle of *respondeat superior* applies. "In an action against a corporation for a malicious prosecution instituted by one of its servants, where it is not

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shown that the servant had any express authority to institute the prosecution, the burden is upon the plaintiff to show that the servant from the nature of his duties had implied authority to prosecute the plaintiff." *Thomas v. Can. Pac. Ry. Co.*, cited *supra*. This principle is recognized in nearly, if not quite, all of the cases above cited. Others, further illustrating it, may be found in the valuable notes to *Sharp v. Railway Co.*, 184 N. Y. 100, 76 N. E. 923, 6 Am. & Eng. Ann. Cas. 250, and *Thomas v. Railway Co.*, 14 Ont. L. Rep. 55, 8 Am. & Eng. Ann. Cas. 324. No such implication arises from the fact that the officer is paid by the person at whose instance he was appointed. Although so paid, he is *prima facie* a public officer, and not a private servant. *Healey v. Lothrop*, 171 Mass. 263, 50 N. E. 540; *Tucker v. Erie Ry. Co.*, 69 N. J. Law, 19, 54 Atl. 557; *Cordner v. Railway Co.*, 72 N. H. 413, 57 Atl. 234; *Foster v. Railway Co.*, 140 Mich. 689, 104 N. W. 380; *Tyson v. Bauland Co.*, 186 N. Y. 397, 79 N. E. 3, 9 L. R. A. (N. S.) 267. But such officers frequently perform acts or services directly, immediately, and primarily beneficial to their employees, and at their instance and under their direction. Such special employment may include an express direction to arrest or prosecute all persons whom the officer may suspect of offenses against the property or rights of his employer. If there is no such express direction, it may be inferred from the nature of the duties imposed or the services to be rendered, and, if so, the authorization or instigation is established by way of implication. In such cases the relation of master and servant is made out, and then the question is whether the act done was within the scope or course of the servant's or agent's employment, and the principles enunciated in *Gillingham v. Railroad Co.*, 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798, 29 Am. St. Rep. 827, and *Davis v. Railroad Co.*, 61 W. Va. 246, 56 S. E. 400, 9 L. R. A. (N. S.) 993, in which the acts were done by railway conductors, apply. In *Sharp v. Erie Ry. Co.*, 184 N. Y. 100, 76 N. E. 923, the plaintiff's decedent, caught in the act of stealing a ride on a train, had been pursued by a detective employed by the railway company out of the railway yards on to adjacent lands, and there shot by the latter. There was evidence tending to show that the railway company had employed the detective to protect its track and property, and look after crimes committed against it and its right of way, and the court held that it was for the jury to say, under all the facts and circumstances shown in evidence, whether the detective acted within the scope of his employment, or whether, being a public officer, he acted in that capacity alone. *Deck v. Railway Co.*, 100 Md. 168, 59 Atl. 650, 108 Am. St. Rep. 399, developed facts very similar to those shown in *Sharp v. Railway Co.*, *supra*, and the court held the case one proper for jury determination. The plaintiff had been stealing a ride on a freight train, and a special policeman,

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employed by the company, ordered him off, and then shot him when he was a few feet distant from the track. In *Dickson v. Waldron*, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 24 L. R. A. 483, 488, 41 Am. St. Rep. 440, the plaintiff had been assaulted and beaten in a theater by a special officer at the time on duty there. The assault and battery grew out of a controversy between the plaintiff and the ticket seller. It was a part of the special officer's duty to maintain order in the establishment, and the ticket seller had demanded the arrest of the plaintiff. The court held the proprietor of the establishment liable for the act of the officer. Speaking of the character of the act, the judge, who delivered the opinion of the court, said: "Even if he were a regular patrol man, called in off the street by appellants or their agents to aid in enforcing the regulations of the theater, he would for such purpose be only the agent of appellants, and for his conduct as such agent, within the scope of his employment, appellants would be responsible." This view, or process of reasoning, resulted in the following conclusion in *Foster v. Railway Co.*, cited: "Where a special deputy sheriff who was paid by a street railway company, and whose duty it was to preserve order at a resort owned by the company, and ride upon the cars and prevent disturbances, assaulted a passenger on a car in assisting a conductor to eject him for nonpayment of fare, the officer in so doing represented not the public, but his employer, and the street railway company was liable."

If, however, it does not appear that the act done was within the scope of the servant's employment, or that there was any employment or contract of service beyond that by which the person or corporation at whose instance the appointment to the office was made bound himself to pay the officer for his services as a policeman, or that the arrest was made or the person prosecuted at the instance or by the direction of the person who has the appointment made, there is no liability upon such person for the act. In *Healey v. Lothrop*, cited, Mr. Justice Holmes, delivering the opinion of the court, said: "If the statute had meant to make the officer the servant of the person who applies for his appointment and gives bond for his conduct, presumably it would have said so. But, if it had said so, it would have insisted upon a fiction being treated as a fact. It is true that the defendant asked to have an officer appointed, perhaps asked to have Mead appointed, and that he paid him. But he did not appoint him, could not remove him, and could not control his official conduct, which was governed by the regulations of the police commissioners and his own sense of duty as a public officer. The statute does not call the relation that of master and servant, and goes no further than to make the defendant liable upon his bond 'to the same extent' as for a servant. The words quoted imply that the officer is not one. They mean to the same extent

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as in another case which does not exist." In *Tyson v. Bauland Co.*, cited *supra*, the arrest was made in the store of a company that had requested the appointment of the officer and paid him for his services on a charge of theft in the store by a customer, and, it not appearing that the company had directed the arrest to be made, or the plaintiff to be prosecuted, although a floor walker had brought the loss to the attention of the officer, the court held that the trial court should have directed a verdict for the defendant. The subject of the alleged theft was not goods or property of the store, but money of another customer who happened to be in the store at the time. In *Smith v. South-eastern Ry. Co.*, L. R. 5 C. P. 640, there had been a controversy between railway servants and the plaintiff. Incidentally a special officer employed and paid by the company assaulted the plaintiff and others. After the struggle was over, the special officer gave the plaintiff into custody. The court held the company not liable, because the act of giving him into custody was beyond the scope of the servant's employment. One of the rules of the company said any officer or servant sworn as a constable for the district or place where he was on duty might take into custody any one whom he saw commit an assault upon another at any of its stations for the purpose of putting an end to any fight or affray, but not if the affray had come to an end. It appeared from the evidence of the plaintiff that he was not given into custody until after the fight had ended, and the court said: "We are disposed to draw the inference in fact that Antonio in giving the plaintiff into custody was not acting within the scope of his employment by the company, or on behalf of, or for the benefit of, the company." Agreeably to this, the court said in *Dickson v. Waldron*, cited *supra*: "If, however, after entering the theater, he (the officer) should discover appellee in the act of violating a criminal law of the state or a penal ordinance of the city, and should proceed to arrest him for it, such act of arrest would be that of a police officer. And if such arrest were made on the officer's own motion, without direction, express or implied, on the part of the appellants, then the appellants would not be responsible."

In view of these precedents and principles, we are of the opinion that the railway company is not liable to the plaintiff for the injuries inflicted upon him. He was not arrested or prosecuted for any act respecting the railway company or its property. The offense with which he was charged was an act done respecting the wife of the prosecuting officer, and did not in any way involve any right of the company. That it was done upon the premises of the railway company is in our opinion immaterial. The motive of the arrest, assault, and prosecution clearly appears to have been either vindication of the law, or a desire on the part of the officer to avenge the insult to his

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wife or to comply with her wishes, and in none of these aspects of the case would the company be responsible for the acts, however unjustifiable they may have been. Nor is it material that the plaintiff had a return ticket, was lawfully at the station awaiting a train, and was not carried by the railway company. According to the evidence, his losses and injuries were all caused by Downey, not the railway company.

Perceiving no error in the judgment, we affirm it, with costs and damages.

Affirmed.

BOMMARIUS v. NEW ORLEANS RY. & LIGHT CO.

(Supreme Court of Louisiana, April 26, 1909.)

[49 So. Rep. 213.]

Carriers—Carriage of Passengers—Care Required.*—A conductor of an electric car, before giving the signal for his car to resume its course after one or more passengers have alighted, must look into the car to see if other passengers are in the act of alighting.

Interest—Judgments—Accrual.—A judgment for personal injuries negligently inflicted draws interest from its date, and not from judicial demand.

Costs—Costs on Appeal—Party Liable.—One who prays for interest only from the date of the judgment, but who fails to correct the error of the court rendering judgment in his favor with interest from judicial demand, while interest runs only from the date of the judgment, is liable for the costs of an appeal from the judgment, amended so as to make interest run from its date.

Appeal from Civil District Court, Parish of Orleans; **THOMAS C. W. ELLIS**, Judge.

Action by Frederick H. Bommarius against the New Orleans Railway & Light Company. From a judgment for plaintiff, defendant appeals. Amended and affirmed.

Dart & Kernan and William Kernan Dart, for appellant.
Edwin Howard McCaleb, Jr., for appellee.

PROVOSTY, J. Plaintiff's statement is that he boarded one of the Dauphine Street cars of the defendant company, on Canal street, intending to visit his mother-in-law on Mazant street, and having with him his three year old child; that, there being no corner light at Mazant street, he gave the signal for the car to stop at Bartholomew street, which is the next street before reaching Mazant, where there was a corner light; that another passen-

*See first foot-note of fourth preceding case.

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ger rang the bell at the same time that he did, and immediately got up and walked to the platform of the car, and, when the car slackened speed and was about to come to a stop, got off; that, the moment this passenger got off, the conductor, without looking to see if any other passengers was in the act of leaving the car, gave the signal for the car to resume its speed; that at that moment he (plaintiff) had just left his seat, with the child in his arms, and was starting towards the door; that the car resumed its speed with great and unusual suddenness, so much so that he was thrown to the floor and injured; that the failure of the conductor to look into the car to ascertain whether other passengers were not in the act of getting off the car, and also the unaccustomed suddenness with which the car was made to resume its speed, constituted negligence on the part of the defendant company, for which it is answerable in damages.

The defendant company claims that the stop signal was given for a stop at Mazant street, and that the stopping of the car in response to it was done in the usual way. It says that plaintiff's breath smelt strong of whiskey when he was picked up, and that this probably accounts for his fall.

The theory of drunkenness is not borne out by the evidence. As to the stop at Bartholomew street, and a passenger getting off, and the car suddenly resuming its speed, and plaintiff's falling, plaintiff is corroborated by one witness. On the other side are the conductor and the motorman. It is a case of about evenly balanced testimony, where the trial judge who saw and heard the witnesses has decided in favor of plaintiff. He allowed \$500 damages. The injuries consisted in cuts and bruises about the face. The appeal is by defendant, and plaintiff asks for an increase. We will not disturb the judgment.

We do not agree with defendant that it is not the duty of the conductor of an electric street car, before giving the signal for his car to resume its course, after one or more passengers have alighted, to look into his car to see if other passengers are not in the act of getting off the car. Ordinary prudence would suggest that he do so. As to the rule in such cases, see 6 Cyc. 615; 5 A. & E. E. 576.

Interest is made to run on the judgment appealed from from judicial demand, instead of from date of judgment. This must be corrected, and has the effect of throwing costs of appeal on plaintiff. Plaintiff is really not responsible for this error, as he had prayed for interest only from date of judgment; but he should have corrected the error in the lower court by a remittitur.

The judgment appealed from is amended, so as to make interest thereon run from date of judgment, instead of from judicial demand, and, as thus amended, is affirmed. Defendant to pay the costs of the lower court, and plaintiff those of the appeal.

BOSTON ELEVATED RY. CO. *v.* SMITH.

(Circuit Court of Appeals, First Circuit, March 16, 1909.)

[108 Fed. Rep. 628.]

Carriers—Carriage of Passengers—Injuries—Starting with Jerk.*—
The possibility that an electric street car will start with more or less of a jerk is an incident of travel in such conveyance which every passenger must expect and of which he assumes the risk; and the mere fact that a car started with a jerk and that a passenger fell and was hurt does not make out a case of negligence in starting the car, but the proof must go further and show that the start was unusually sudden or violent.

Carriers—Electric Street Railroads—Carriage of Passengers—Injuries—Starting with Jerk.†—Plaintiff, who was a robust woman weighing nearly 200 pounds, entered an electric street car at a regular stopping place, carrying in one hand an umbrella and a small hand bag. When she was fully upon the floor of the vestibule the conductor gave the starting signal, and as plaintiff was about stepping into the body of the car it started, and she fell and was injured. Held, that there was nothing in her appearance to require the conductor to exercise special or unusual care, and that, under the settled rule in Massachusetts that under ordinary circumstances it is not negligence for a conductor to give a starting signal after a passenger is fully and fairly upon the car, the conductor in such case was not chargeable with negligence which rendered the street railroad company liable for plaintiff's injury.

In Error to the Circuit Court of the United States for the District of Massachusetts.

M. F. Dickinson and *Walter Bates Farr*, for plaintiff in error.
Julian C. Woodman, for defendant in error.

Before COLT, PUTMAN, and LOWELL, Circuit Judges.

COLT, Circuit Judge. This is an action of tort to recover damages for personal injuries. The plaintiff was a passenger on an electric street car operated by the defendant. She had just boarded the car, when, upon the sudden movement of the car in starting, she fell upon the floor, inflicting the injuries complained of. The jury returned a verdict for the plaintiff.

At the close of the evidence the defendant requested the court to rule as follows:

*See last foot-note of *Field v. Delaware, etc., Co. (N. J.)*, 9 R. R. R. 653, 32 Am. & Eng. R. Cas., N. S., 653, where all those preceding it are collected; foot-note of *Howard v. Louisville R. Co. (Ky.)*, 30 R. R. R. 116, 53 Am. & Eng. R. Cas., N. S., 116.

†See foot-note of preceding case.

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"(1) Upon all the evidence in the case the plaintiff is not entitled to recover.

"(2) There is no evidence in this case sufficient to warrant the jury in finding that the plaintiff's injuries were due to the negligence or carelessness of the motorman in the way and manner in which he started the car.

"(3) Nor is there sufficient evidence to warrant the jury in finding that the conductor was negligent or careless in giving the signal to start the car when he did, under all the circumstances in this case."

These rulings the court declined to make, and the defendant duly excepted. There were also other requests for rulings which we find it unnecessary to consider.

The material facts are as follows:

On November 15, 1906, about 8 o'clock in the evening, when returning home from her work, the plaintiff boarded one of the defendant's inward-bound cars at the corner of P and third streets, South Boston. She was carrying in her hand at the time an umbrella and a small hand bag. The night was stormy. The car had just left the carhouse, and the only other person on the car except the motorman and conductor of the car were three conductors employed by the defendant, who were returning home after their day's work. The car was a vestibuled closed car, and the threshold of the door leading into the car was 6½ inches above the floor of the platform, and on this threshold were two small projections on which the door runs.

The plaintiff was a German woman, 52 years of age, 5 feet 5 inches in height, and weighed about 198 pounds. She was a stout woman in appearance, and she was slow in her movements. She was accustomed to riding on electric cars. According to her story, she had mounted the platform, and was about to enter the car door, with her umbrella and bag in one hand, and holding her dress in the other, when the car was started with a sudden jerk, which threw her to the floor, injuring her leg, abdomen, and arm.

In her testimony the plaintiff says:

"I got onto the platform, and as I was trying to get inside the car, holding up my dress, the car started with a sudden jerk, unusually quick. I was slightly thrown back and forward before I had a chance to put my foot on the threshold of the door. I came down on my shin on the threshold with my knee. I fell on my shin, and with my left leg I went down on my knee, and I tried to reach forward to catch the door or something to hold myself, but I couldn't. I was thrown forward, and my arm came under me. One of the employees assisted me up. I had my bag and umbrella, which flew halfway in the car.

"I was seated on the corner seat on the right-hand side after the accident. One of the carmen came and asked my name and

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asked me if I was badly hurt and I said, 'Yes.' I could scarcely speak, but I managed to get home, but it was very hard, and I tried to go to work the next morning, but I was unable to work. I went home and sent for the doctor. I stayed home between five and six weeks, and I have not fully recovered to-day. I was out of work between five and six weeks. I was obliged to go to work in order to support myself and my aged sister. There was no trouble about finding a seat in the car. There were five carmen inside the car. They sat one near each door and two on each side up above. I had an umbrella and bag in one hand, and lifted my skirt in order to avoid stepping on it. It was raining; it was snowing; it was a very stormy night. The car windows were covered with snow. I was thrown back a little first and then forward. When I fell I hit both my shins, both my knees, and landed very heavily on the lower part of my stomach and my arm. The car was on a straight track. My experience is that if a car is on a straight track and starts with a sudden jerk it will throw a person backward.

"Q. You did step on your skirt when you were entering? A. I did not step on it.

"Q. You say that you had got on the platform of the car and were going inside and putting your foot on the step of the floor of the car, and that is the time the car started? A. Yes.

"Q. Which foot did you put upon the floor? A. Right foot.

"Q. You say that you were thrown back a little? A. Thrown back a little, and then forward.

"Q. How was it you were thrown forward if you didn't step on your dress? A. The sudden jerk of the car.

"Q. Sudden jerk of the car forward you mean? A. The car started suddenly.

"Q. With a jerk. A. With a jerk, before I had a chance to get inside."

In addition to her own evidence, the plaintiff called as witnesses two physicians who testified as to her injuries. Dr. Hays, her attending physician, said that he called on the plaintiff on November 15, 1906; that he found, among other injuries, transverse abrasions of the right shin, about junction of the middle and lower third, with indentation of bone at that site; just above these were two smaller abrasions, similar, but not so pronounced; that the indentation was still to be found at the time of the trial. The plaintiff also called, as a witness, John W. Sullivan, an expert in the operation of electric cars, who testified as to the manner of starting cars gradually and slowly, or with a jerk. This comprises the entire evidence of the plaintiff.

The defendant called as witnesses the conductor and motorman of the car, and the three other conductors who were aboard at the time. All these witnesses testified that the car started in the ordinary way, or with no unusual jerk; and they all, except the

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motorman, further testified that the plaintiff was inside the car door about two feet, when the car started, and she fell upon the floor, and that she seemed to fall by reason of tripping on her skirt.

Upon the foregoing facts the question of the defendant's negligence involves two inquiries:

(1) Was there any evidence sufficient to warrant the jury in finding that the motorman started the car with an unusually sudden jerk?

(2) Was there any evidence sufficient to warrant the jury in finding that the conductor was guilty of negligence in giving the starting signal too soon?

1. While the evidence shows that the plaintiff's fall and consequent injuries were caused by the movement of the car in starting, there is no substantial evidence that the car was started with any unusual jerk. The statement of the plaintiff in her declaration that she "was violently thrown down * * * in starting the car" is not supported by the proofs. While she testifies that the car was "started with a sudden jerk, unusually quick," this is immediately qualified by the statement that she "was slightly thrown back and forward;" and this statement is repeated with a slight change in form: "I was thrown back a little first and then forward;" and in her cross-examination, although she says "the car started suddenly," this is again qualified by the statement that she "was thrown back a little and then forward." This evidence is consistent with the ordinary jerk of the car in starting, and is inconsistent with any sudden or violent jerk. Again, according to her own story, her position was such, as she was about stepping from the platform upon the threshold of the car, with her umbrella and bag in one hand and holding her dress in the other, that any ordinary jerk of the car in starting would be likely to throw her down, unless she braced herself in some way against the side of the door.

There is also the evidence that her "bag and umbrella flew half-way in the car," and that there was an indentation in the shin bone caused by her fall. While this evidence has a bearing on the degree of suddenness with which the car started, we do not think it is sufficient to make out a case of negligence, in the absence of other clear evidence that the start was unusually sudden or violent. The bag and umbrella would naturally be thrown from her hand in trying to save herself from falling, while the indentation might be caused by the simple fall of a heavy woman in striking her shin against the projections of the threshold of the car door.

It is well understood by persons accustomed to ride on electric cars that the cars are liable to start with more or less of a sudden movement or jerk. Since this is one of the known and common incidents of traveling by this mode of conveyance, the

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ordinary passenger may be said to assume this risk. He expects that the car may start with a greater or less degree of jerk, and he realizes that he must exercise due care to protect himself against such a movement. The mere fact, therefore, that the car starting with a sudden movement or jerk, and that the plaintiff was hurt, does not make out a case of negligence, in the manner of starting the car, but the proof must go further and show that the start was unusually sudden or violent.

In *McGann v. Boston Elevated Railway Company*, 199 Mass. 446, 85 N. E. 570, the plaintiff was thrown from the defendant's car and injured, and the court below refused to direct a verdict for the defendant, or to rule that there was no evidence of negligence on the part of the motorman or on the part of the conductor; and the exceptions to these rulings were sustained by the Supreme Court. There was evidence in that case that the car "made a sudden jump," that the car "gave a jerk," and that the car "started with a sudden jerk or jump." The court in its opinion, which was drawn by Mr. Justice Loring, said:

"A plaintiff does not make out a case by proving that an electric car made a jerk or similar motion, and that he was hurt. * * * The possibility of an electric car giving a jerk is an incident of travel which every passenger must expect. To make out a case of negligence on the part of a defendant railway company in such a case, the plaintiff must go further and introduce evidence that the jerk in question was due to a defect in the track or to negligence in the operation of the car."

In the earlier and leading case of *Byron v. Lynn & Boston Railroad Company*, 177 Mass. 303, 305, 58 N. E. 1015, the plaintiff's intestate was on the rear platform of the car when the car, on passing over a switch, gave a sudden swing or jerk, which threw him from the car. In the opinion, Mr. Justice Barker, speaking for the court, said:

"Upon full consideration of the evidence, we are of the opinion that it would not justify a finding that the defendant was negligent. * * * The plaintiff's intestate was thrown to the ground by a swaying, or jolt, or lurch of the car, as it returned to the main track from a siding. Such motions of street cars are of common and frequent occurrence, and are to be expected to a greater or less degree whenever the car passes from one track to another, and so are of the class of usual and unavoidable incidents in the use of cars upon the streets. * * * Unless they are unusual in degree and caused by some defect in the car or the track or by some unusual or dangerous rate of speed, they furnish no evidence of negligence on the part of the carrier or of its servants. * * * There was no evidence that the jolt was due to any defect in the car or in the track, or that the car was proceeding at an extraordinary speed. * * * The jar felt by the different witnesses was not so great as to be unusual, or as to justify a finding that it was due to negligence of the defendant or of its servants."

Boston Elevated Ry. Co. v. Smith

In *Jameson v. Boston Elevated Railway Company*, 193 Mass. 560, 562, 79 N. E. 750, 751, there was testimony that the plaintiff's intestate had boarded the car, and that "it started suddenly and threw him his length, and he put his hand in a woman's handbox up to his elbow." In the opinion in that case, the court said:

"These statements did not go far enough to show that he was in the exercise of due care, or that the defendant's servants were negligent. All that the plaintiff proved was that in some way her testator, who was feeble on his legs, fell on the defendant's car starting apparently in the usual way, with something of a jerk."

In *Timms v. Old Colony Street Railway Company*, 183 Mass. 193, 66 N. E. 797, where the plaintiff was standing near the edge of the platform, and was thrown off the car and injured, the court uses the following language:

"There is nothing in the evidence to show that there was any defect in the car or in the condition of the rails, and jerks in the motion of street cars are not unusual."

In *Sanderson v. Boston Elevated Railway Company*, 194 Mass. 337, 341, 80 N. E. 515, 517, the plaintiff was thrown off the car and injured, and there was evidence that the car made a "plunge," a "kind of a lurch," a "jar ahead to a considerable extent," a "movement such as you feel when the power is applied." In the opinion, Mr. Justice Hammond, speaking for the court, said:

"Even if the plaintiffs' theory of the accident be adopted, the evidence discloses no negligence of the defendant. There does not appear to have been any evidence of defect in the car or tracks, or of incompetency of the defendant's servants. * * * There may be movements of a car so severe that a mere description of them and their results may justify the inference that they were attributable to some negligence on the part of the carrier, but the movement described in this case is not of that character. It was not due to any defect, and the possibility of such a movement is a thing which every one who gets upon a street car must be taken to contemplate."

Under these decisions the plaintiff's evidence in the case at bar is clearly insufficient to warrant the finding that the motorman was negligent in the way in which he started the car.

2. The remaining question is whether there was any evidence sufficient to justify a finding that the conductor was negligent in giving the starting signal too soon.

It is settled law in Massachusetts that under ordinary circumstances it is not negligence for a conductor to give the starting signal after the passenger is fully and fairly upon the car. *Sauvan v. Citizens' Electric Street Railway Company*, 197 Mass. 176, 177, 83 N. E. 405. The practical reasons underlying this rule are obvious. The public demands as rapid transportation on street cars as conditions will permit. To this end it is necessary that

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there should be as little delay as possible in the frequent stopping of the cars to take on passengers. If, therefore, it were the duty of the conductor to wait until each passenger is seated before giving the starting signal, it would result in much delay, and consequently the running time would be much slower; and hence it has become the common practice, under ordinary circumstances, for the conductor to ring the starting bell as soon as the passenger is fully on the car; and it may be said that the ordinary passenger anticipates this as one of the usual incidents in the operation of street cars, and is accordingly on the lookout to protect himself from any serious consequences resulting therefrom.

In the case at bar the plaintiff was fully upon the car when the conductor gave the starting signal. She says:

"I got onto the platform, and as I was trying to get inside the car, holding up my dress, the car started * * * before I had a chance to put my foot on the threshold of the door."

The conductor must have given the signal to start a moment before this, and therefore the plaintiff had fully boarded the vestibule of the car at the time the signal was given. Nor does it appear that there were any extraordinary or exceptional circumstances in this case, such as might be held to take it out of the general rule laid down in *Sauvan v. Citizens' Electric Railway Company*. The plaintiff was a woman of mature years and apparently in good health, and she had had experience in riding upon electric cars. That she was a stout woman, slow in her movements, and carrying a small bag and an umbrella in one hand, does not, in our opinion, take her out of the class of ordinary persons who travel on electric cars. In other words, there was nothing in her appearance of such an unusual or exceptional character as to make it the duty of the conductor to exercise special care in her case by waiting until she was seated in the car before giving the starting signal.

The facts in the *Sauvan* Case very closely resemble those in the case at bar. In that case the plaintiff was "a large robust woman, weighing about 170 pounds," who "looked and was in perfect health." She got upon the car at a regular stopping place when the car was standing still. She was proceeding to her seat when the car started, causing her to fall against the woodwork inside the car. According to her evidence, she had stepped up over the steps into the vestibule, and was fully and fairly on the floor of the vestibule of the car before the conductor rang the starting bell. Her complaint was that the starting bell was rung when she had put one foot on the floor of the car, had thrown her weight onto that foot, and was in the act of bringing the other foot up and forward; and she contended that on this evidence the jury could have found that the conductor, in giving the signal to start the car when he did, did not use the care which is owed by a common carrier to one of its passengers.

Chesapeake & Ohio Ry. Co. v. Vaughn

In the opinion of the court, Mr. Justice Loring said:

"If the starting signal was given when the plaintiff contends that it was given, it seems hardly possible that the car could have started before the second foot had reached the car floor, or, at any rate, it might well be contended that the conductor could not have anticipated such an instantaneous response to his signal. But apart from that, it is settled in this commonwealth that under ordinary circumstances it is not negligence for a conductor to give the starting signal after the passenger is fully and fairly on the car."

We think the case at bar comes clearly within the Massachusetts rule laid down in the *Sauvan Case*; and it follows that, the plaintiff being fully and fairly upon the car, the conductor was not guilty of negligence in giving the starting signal.

The judgment of the Circuit Court is reversed, the verdict set aside, and the case remanded to that court with directions to order a new trial, and the plaintiff in error recovers costs in this court

CHESAPEAKE & O. RY. CO. v. VAUGHN.

(Court of Appeals of Kentucky, Jan. 13, 1909.)

[115 S. W. Rep. 217.]

Trial—Instructions Not Sustained by Pleading.—An instruction submitting an unpleaded defense is properly refused.

Bail—Criminal Cases—Rights of Bondsmen.—A bondsman for one who failed to appear to answer an offense can arrest and hold him.

Carriers—Passengers—Persons under Arrest—Carrier's Duty to Custodian.—A bondsman for one who failed to appear to answer an offense, having arrested him, was entitled, while taking him to the county seat on a railway train, to the same treatment and protection as other passengers; but he was bound to ride in the car and keep his prisoner therein while the train was in motion, the carrier's employees not being bound to assist plaintiff in holding the prisoner; and when they found the bondsman and his prisoner struggling on the platform they had the right to stop the train and require them either to go in the car or get off, and if, when the train stopped, the bondsman alighted to prevent the prisoner's escape, the employees were bound to give him reasonable opportunity to reboard the train with the prisoner, and if through their failure to do so, and not through the prisoner's disobedience, the bondsman was left by the train, he can recover from the carrier reasonable compensation for time lost and expenses incurred.

Appeal from Circuit Court, Lawrence County.

"Not to be officially reported."

Action by O. J. Vaughn against the Chesapeake & Ohio Rail-

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way Company. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

M. C. Kirk and F. T. D. Wallace, for appellant.

A. J. Garred and G. W. Castle, for appellee.

CLAY, C. Plaintiff, O. J. Vaughn, instituted this action against the Chesapeake & Ohio Railway Company to recover damages for being ejected from its train. The jury returned a verdict in favor of plaintiff for the sum of \$200, and from the judgment based thereon the railway company appeals. A reversal is asked on the ground that the court refused to give an instruction offered by defendant and that the instructions given by the court are erroneous.

The facts of the case are as follows: At the time it is alleged that Vaughn was ejected from defendant's train the railway company was operating a passenger train from the town of Ashland to Pikeville, Ky. One Thomas Layne was charged with an offense in Lawrence county, and the plaintiff and two others were on his bond for his appearance in the county court of that county. When the day of trial arrived, Layne failed to appear. The plaintiff and other parties on his bond secured copies of the bond, and went to the town of Ashland, and placed Layne under arrest. They then boarded one of defendant's trains about 4 o'clock in the afternoon. After the train had started, and proceeded some distance, Layne arose and walked to the platform of one of the cars. Defendant's brakeman, while going through one of the coaches, found Layne and plaintiff and the others who were on the bond struggling with each other on the platform. Layne was attempting to swing off the coach, and plaintiff and two others were endeavoring to prevent him from doing so. The train at the time was running about 25 to 30 miles an hour. The brakeman asked those who were wrestling with Layne what they were trying to do with him. He then told them that they would get that man killed, and to turn him loose. Plaintiff replied that they could not do that, as they had Layne under arrest. The brakeman then told them to turn the man loose or get off, after which he pulled the bell cord, stopped the train, and told the parties to get off. While the parties were on the ground, the conductor came along and asked what was the trouble. Plaintiff informed him that Layne was under arrest, and the conductor asked plaintiff and the other parties if they had any authority to arrest the man. One of them replied that they had, and produced a copy of the bond. The conductor asked that the bond be read to him. According to the testimony for plaintiff the train was started while the bond was being read. The defendant's witnesses testified that the parties failed and refused to read the bond. These witnesses also denied that they told plaintiff to get off the train. They claim that Layne

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jumped off the train, and that plaintiff and those with him followed after Layne. While the parties were on the ground, the conductor claims to have asked them what they were going to do, at the same time stating that his train was between a block and he could not remain there any longer. Plaintiff and those with him made no reply, and the conductor thereupon told the brakeman or baggageman to give the proper signal for the engineer to move ahead to Catlettsburg.

During the trial of the case there was evidence to the effect that Layne himself had paid plaintiff for his loss of time and for the additional expense incurred by him, resulting from their not being able to continue on the train. Plaintiff and those with him had to go to a hotel that night and remain over to the next day. Counsel for appellant contends that the court erred in failing to instruct the jury that, if they believe plaintiff had been paid in full for all losses and expenses incurred by him as a result of being left at Ashland, they should find for the defendant. There was no plea, however, embracing the defense covered by the instruction offered, and the court, therefore, did not err in refusing to give the instruction.

Without entering into a discussion of the instructions given by the court, we may say that with the exception of instruction No. 1, those given do not properly present the law of the case. Instruction No. 1 is as follows: "The court instructs the jury that the plaintiff, as one of the bondsmen of Thomas Layne for his appearance in the Lawrence county court, had the right to arrest and hold him in custody, and had also the right while so holding him in custody to carry him on defendant's train to Louisa, in Lawrence county, and was entitled to the same treatment and protection as other passengers on said train."

On the next trial of the case, the court, in addition to instruction No. 1, will give the following instructions:

"No. 2. It was incumbent on the plaintiff to ride in the car, and to keep Layne, whom he had in custody, in the car when in motion. It was not the duty of the defendant's servants in charge of the train to assist plaintiff in holding Layne; and when, after the train started, they found plaintiff in a struggle with him on the platform, they had the right to stop the train and require them either to go in the car or get off; and if, when the train stopped, plaintiff got off the car to hold Layne, who was attempting to escape, it was the duty of the defendant's servants to give plaintiff a reasonable opportunity to get on the car with Layne, and if they failed to do this, by reason thereof, and not by reason of Layne's refusing obedience to him, plaintiff was left by the train, the jury should find for the plaintiff in such sum as will reasonably compensate him for the time he thus lost and any expenses he thereby incurred.

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"No. 3. If the defendant's servants, after plaintiff got off the car, gave him a reasonable opportunity to get on the car with Layne, and he did not get on because Layne refused to get on, the law is for the defendant, and the jury should so find."

For the reasons given, the judgment is reversed, with directions for a new trial consistent with this opinion.

ORMAN v. NEW YORK, C. & ST. L. R. Co. et al.

(Court of Appeals of New York, March 5, 1909.)

[87 N. E. Rep. 682.]

Carriers—Injuries to Passengers—Negligence—Question for Jury.—In an action for injuries to a passenger in a collision between his train and a train operated by another company at a grade crossing of the two roads, evidence held to justify a finding that the towerman signaling for the crossing was negligent, authorizing a recovery against the carrier.

Railroads—Injuries to Passengers—Negligence—Question for Jury.—Where several railroads rely on and make general and joint use of a tower for signals for a crossing of their roads at grade, and the safety of which they are all bound to guard, each road is liable for the proper operation of the tower.

Railroads—Collisions—Negligence.—A railroad, operating its freight train on a track crossing at grade another road on which a passenger train is running, must use reasonable care and caution and obey the signals given by the towerman signaling for the crossing, and where its fireman failed to exercise reasonable care and to obey the signals, and as a result thereof its train ran into the passenger train, injuring a passenger, it is liable to the passenger without reference to the question of the competency of the fireman.

Railroads—Collisions—Complaint—Evidence.—Where, in an action against a railroad for running its freight train into the passenger train of another road at a grade crossing, injuring a passenger, it was not claimed that a defect in the engine of the freight train was negligence, evidence of the defect, to establish negligence, was inadmissible.

Carriers—Injuries to Passengers—Negligence—Evidence.—Where, in an action against a carrier for injuries to a passenger in a collision between his train and a freight train on another road at a grade crossing, the evidence showed that the signal at the crossing was set at safety for the passenger train, evidence of the use at grade crossings of interlocking signals and switches so arranged that the

*See third foot-note of *Schulte v. Louisville & N. R. Co. (Ky.)*, 29 R. R. R. 203, 52 Am. & Eng. R. Cas., N. S., 203; note, 27 R. R. R. 273, 50 Am. & Eng. R. Cas., N. S., 273.

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signal, when set against a train, opened a switch and either derailed or side-tracked the train before it could reach the crossing, and that the carrier was negligent because it did not employ such device at the crossing, was inadmissible.

Edward T. Bartlett, J., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by William J. Gorman against the New York, Chicago & St. Louis Railroad Company and another. From a judgment of the Appellate Division (122 App. Div. 896, 106 N. Y. Supp. 1127) affirming a judgment for plaintiff against both defendants, they appeal. Reversed, and new trial granted to both defendants.

The action was brought to recover damages for injuries sustained by respondent while a passenger on a train operated by the South Buffalo Railway Company, caused by its collision with a freight train operated by the other appellant at a grade crossing of the two roads.

The physical situation at and around the crossing was as follows: The tracks of the appellant the New York, Chicago & St. Louis Railroad Company run north and south parallel with and a short distance from tracks owned and operated, respectively, by the Pennsylvania and Buffalo Creek Railroads which are not involved in this action. Two tracks of the Delaware, Lackawanna & Western Railroad Company leased and occupied by the appellant South Buffalo Railway Company, running east and west, cross the above-mentioned tracks at grade and practically at right angles. In the space included by these three sets of tracks was a signal tower which gave signals for the crossing of all the railroads. This tower was equipped with three sets of signals, one set for each line of tracks, and which consisted of two discs, one white and one red, and all operated by ropes by a signalman in the tower. The red disc displayed to a train on any road indicated that the crossing was occupied, and that it must stop, and the white signal indicated the contrary.

The passenger train of the appellant South Buffalo Railway Company, on which respondent was riding, had stopped at a station a short distance before reaching the crossing, and it is undisputed that it had the safety signal telling it to proceed over the crossing. The train of the other appellant was shifting freight cars. The respondent tried his case on the theory that the danger signal for the crossing was displayed to this latter train at all times, but the fireman of the train testified that at first he received the white signal to go ahead, and then when it was too late to stop discovered that the signal had been changed to danger, and the collision occurred. This crossing was very much used; between 300 and 400 trains in the aggregate using it each day. The signal tower operator at the time of the accident had been continuously on duty for 18 hours.

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Louis L. Babcock, for appellants.

Clarence M. Bushnell, for respondent.

HISCOCK, J. (after stating the facts as above). On the facts included in the foregoing statements, and such others as appear in the record, the respondent was entitled to have his cause submitted to the jury as against both appellants. This is hardly disputed in the case of the New York, Chicago and St. Louis Railroad Company, and we do not regard any discussion necessary on that point with respect to that appellant. While a cause of action for the consideration of the jury as against the other appellant was less conspicuously established, we think one was made out. Although the respondent by his evidence at all times insisted that the collision was caused by the disobedience or disregard by the fireman on the New York, Chicago & St. Louis Railroad of the danger signal given to him, this fireman gave evidence which permitted a jury to find that the towerman was confused in his signals, first giving him one of safety and then one of danger. All of the roads, including this appellant the South Buffalo Railway Company, relied on and made general and joint use of this tower for signals for the crossing which they all used, and the safety of which they were all bound to guard, and each one must therefore be held liable for the proper operation of the tower. The signalman on duty at the time of the accident had been there for 18 hours giving signals for a great number of trains, and in addition discharging other duties, and under these circumstances we think that the jury had a right to say, if they so desired, that it might have been anticipated that he would become negligent or inefficient, and that the appellant the South Buffalo Railway Company was not exercising a proper degree of care in protecting and safeguarding its crossing.

Passing by this question involving the existence of a cause of action, we are presented with many allegations of error in behalf of each appellant relating to the exclusion and admission of evidence and to the instructions given by the trial judge. Owing to the different situation, rights, and responsibilities of the appellants, respectively, the trial of the action was necessarily somewhat complicated, and some errors were not unnaturally committed which require a reversal of the judgment as to each appellant. We shall not discuss those criticisms upon the conduct of the trial which, in our judgment, are not well founded, but shall simply consider so many of said criticisms as do suggest substantial errors, taking up first the case of the New York, Chicago & St. Louis Railroad Company.

The trial judge permitted the jury to say that this appellant's fireman who was operating the freight train was incompetent as constituting a ground of negligence. We have much doubt whether there was any evidence permitting the jury to say that

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the fireman was incompetent to perform the general duties being discharged by him at the time of the accident; but, if he was, incompetency was no part of respondent's cause of action. Said appellant was bound to run its train with reasonable care and caution, and for that purpose to obey the signals given by the towerman and the requirements of the statute. If the fireman failed in these requirements, and as the result thereof the appellant ran its train into collision with the other train, it is liable no matter how competent the fireman may have been. On the other hand, if the defendant operated its train with due regard to signals and with reasonable care, it is immaterial how incompetent the fireman may have been. This is not an action by a co-employee, but it is an action by a third party, where the question is whether the appellant itself had used proper care, and if it has done this it is not liable, and if it has not done it it is liable no matter how competent the employee through whom it operated may have been. What we have said on this point will bear on certain instructions given to the jury whereby apparently the latter were permitted to find this appellant guilty of negligence because of the temporary absence of the engineer from the engine when taken in connection with the alleged incompetency of the fireman; but we do not intend to hold that it was not permissible to show the jury to consider under all of the circumstances as bearing on this appellant's negligence the fact that its freight train was being operated by only two men without the airbrakes on any of the cars being properly coupled up for use.

The respondent on the cross-examination of this appellant's fireman brought out testimony tending to show that one of the pipes on his engine was broken at the time of the collision, so that he could not apply sand for the purpose of stopping the engine more quickly. He almost stopped the engine before the collision without the use of this sand, and therefore this evidence assumed considerable importance. The counsel for the appellant moved to strike out this testimony, and counsel for the respondent then stated that he was going to ask the witness what he testified to on this question before the coroner and as testing his recollection. Thereupon the court said, "No claim is made that this is one of the items of negligence," and the counsel for the respondent stated, "No, sir; none whatever." Upon this statement the motion to strike out the testimony was not pressed or ruled on, and no objection was made to further questions on this subject. Notwithstanding this the trial judge, in spite of the objection and exception of counsel, allowed the jury to consider this evidence as tending to establish appellant's negligence. This, of course, was manifest and substantial error, and was undoubtedly due to inadvertence on the part of the trial judge and to the manifest difficulty of recollecting all that had occurred on the trial.

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Taking up the case of the other appellant, it appears that some evidence was introduced of the use at grade crossings of systems of interlocking signals and switches so arranged that the signal when set at danger against a train opened a switch and either derailed or side-tracked the train before it could reach the crossing, and the jury was, in substance, amongst other things, permitted to find the South Buffalo Railroad Company guilty of negligence because it did not employ some such device at the crossing in question. This was error under all of the circumstances developed on the trial. So far as the evidence presented in this record discloses, in the employment of such a system, the derauling device would not be put into operation against a train unless the danger signal was set against such train. If the signal was set at safety, the train would not be derailed or stopped. There is no question that the safety signal was set for the train on this road at all times, and on the evidence as presented it is fair to assume that, if such a device as has been mentioned had been in use, the safety signal would in similar manner have been set, and the train allowed to proceed on to the crossing.

For these reasons the judgment appealed from should be reversed, and a new trial granted to both appellants, with costs to abide event.

CULLEN, C. J., and HAIGHT, VANN, WERNER, and WILLARD BARTLETT, JJ., concur. EDWARD T. BARTLETT, J., dissents.

Judgment reversed, etc.

KALIS v. DETROIT UNITED RY.

(Supreme Court of Michigan, March 3, 1909.)

[119 N. W. Rep. 906.]

Carriers—Negligence as to Passengers—Crowded Condition of Car.*

—In an action for the death of a passenger while riding on the inside running board of defendant's open street car by contact with a car on the other track, it is not error to instruct that defendant is liable if its employees permitted other passengers to board the car after deceased in such numbers that deceased was crowded out from the body of the car to a dangerous position.

Carriers—Negligence as to Passengers on Other Cars.—A street car company is liable for the death of a passenger who, while standing on the inside running board of an open car, was struck by a car from the opposite direction on the other track, if the bell on such car was not sounded.

*See extensive note, 4 R. R. R. 536, 27 Am. & Eng. R. Cas., N. S., 536.

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Carriers—Instructions Inconsistent with Theory of Case.—In an action for the death of a passenger while riding on the inside running board of defendant's open street car from contact with a car from the opposite direction on the other track, after a statement by the court that the only question that would be submitted was whether deceased was forced into his dangerous position by the pressure of passengers permitted to board the car after deceased or whether he voluntarily assumed such position, it was error to instruct that, if the bell on the car that struck him was not sounded, plaintiff might recover.

Death—Amount of Damages.—Evidence in an action for the death of a boy 14½ years of age held to show that a verdict for \$2,002 is not excessive.

Hooker, J., dissenting.

Error to Circuit Court, Wayne County; FLAVIUS L. BROOKE, Judge.

Action by Mary Kalis, administratrix of the estate of Walter Kalis, deceased, against the Detroit United Railway, a corporation. Plaintiff had judgment, and defendant brings error. Reversed.

Argued before BLAIR, C. J., and GRANT, HOOKER, MOORE, and McALVAY, JJ.

Brennan, Donnelly & Van De Mark, for appellant.
Clarence P. Milligan, for appellee.

MOORE, J. The trial judge in his charge to the jury so nearly covered the questions of fact and law involved in this proceeding that we quote from it as follows:

"Gentlemen of the jury, in this case, Mary Kalis, as administratrix of the estate of Walter Kalis, deceased, brings suit against the Detroit United Railway, and this suit is brought for the purpose of obtaining damages, resulting to the estate of this boy through his alleged unlawful killing by the defendant. The accident occurred in September, 1906. It appears beyond dispute that this boy on that night, about a quarter to 6, boarded a Baker street car at the corner of Monroe avenue and Woodward in front of the Bagley bust. It appears beyond dispute that the car was full. It was an open car, with a running board on each side. It is not disputed that at the time the plaintiff boarded the car, at least the plaintiff's deceased, that all the seats were filled. The back platform was filled. The outside running board was filled, but that he secured a place upon the inside running board. There is no doubt about that fact. The car proceeded upon its way up Monroe avenue until it came to Farmer street, where it was obliged to stop because another street car crosses there. It was what is known as a compulsory stop. There is some tes-

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timony tending to show that at that point other passengers boarded the car. After that stop, the car proceeded upon its way out Monroe avenue, and when at the corner of Farrar street, or near that point, a Brush street car, on its way towards the city hall, passed the car upon which the dead boy was riding. As it passed him, it struck him, striking his head and shoulders, knocking him to the ground, and killing him almost instantly. It is not disputed that this boy at the time of his death was 15 years and 6 months old. That he was engaged in the manufacturing business in the Detroit Screw Works, I think, and was earning at the time of his death \$10 per week or slightly more, on an average about \$10 a week, I think the testimony shows. It is not disputed that it cost for his maintenance, board, and clothes \$3 a week. So that his estate through his death is the worse off, practically by the amount of the difference between \$10 a week and \$3 a week, or about \$7 a week, if you believe the testimony.

"It is the plaintiff's claim that this boy came to his death through the negligence of the defendant company, and not through any negligence of his own. If the plaintiff can substantiate that claim, she is entitled to recover a verdict at your hands. I charge you, in the first place, that it was not negligence for this dead boy to take a position upon the running board, if at the time he got upon the car there was sufficient room for him to get upon the board and maintain an upright position next to the car. The running board is something like 18½ inches, so that standing next to the stanchion there would be at least two feet between the stanchion of the open car and the nearest point of the Brush street car, a space ample for any man to stand in safely, if the cars were operated in an ordinarily careful and prudent manner. Therefore it would not be negligence for this boy to take position upon the running board; neither would it be negligence, on the part of this defendant company, to permit him to take a place upon the running board. People have ridden upon the inside and outside running boards of these cars for years. There is no question that the company permits passengers to ride there, and there is no question that passengers habitually, when the cars are otherwise crowded, take their position upon those boards rather than wait for another car. So I charge you there was no negligence either in the company permitting him to stand there nor in his taking the position, if at the time he took the position there was room for him to get his feet upon the platform and maintain an upright position, standing upon the steps; because if he had that opportunity, and could have maintained that position, then it was a place, while dangerous, yet with the exercise of care upon his part, and due operation of the cars on the part of the defendant, would have been safe. It is the plaintiff's claim that after this boy boarded the car in

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front of the Bagley bust, and at the stop made at Farmer street, others were permitted by the defendant company to board the car, particularly upon this running board upon which he stood, to such numbers that thereafter he was by other persons crowded out from the body of the car into a position which brought his body or some portion of it where an oncoming Brush street car came and did strike him; and it is urged by the plaintiff that it was an act of negligence on the part of the defendant company, after the inside running board was so loaded with passengers, including the plaintiff's deceased, to permit others to get upon that running board and crowd the plaintiff's deceased out and into a place of danger. I charge you, gentlemen of the jury, if you find that to be a fact, it would be an act of negligence on the part of defendant company. While it is not negligence for them to permit people to stand upon the running boards of their cars, I charge you it would be a negligent act for them to permit the running board to be so crowded as to allow oncoming passengers to push those, who had a proper place upon the platform, into a place of danger; and that would be a question of fact for your determination. I charge you that it was this boy's duty, if the running board was so crowded at the time he boarded it, that he could not get his feet upon it and maintain himself in an upright posture—it was his duty to have stayed off the car and waited for the next one. He would be guilty of an act of negligence, which would preclude him from recovery, if when he went to the side of the car he found all the space on the running board filled, and he could only secure a ride by reaching around somebody else who had a safe place on board; and, if you find he did that, the mother, as his administratrix, cannot recover. I charge you further, if you find that this young lad, either through carelessness, lack of attention, or desire to see his companion in front, or for any other reason, voluntarily or involuntarily, or without knowing it, having secured a place of comparative safety, where he could remain upright and escape injury, if he allowed himself to hang out, and was not crowded out by subsequently arriving passengers, his mother cannot recover because that would be such an act of negligence as would preclude his recovery. In other words, gentlemen of the jury, while a passenger has a right to assume a place upon the inside running board of an open car, it imposes upon that passenger the additional duty to maintain himself in safety, and he has got to use such care as would save him from injury, so long as the company is not negligent in its operation of the car.

"There is no testimony in this case that the tracks were in an extraordinary condition, or that the cars were operated in an unusual manner. There is testimony that no bells were rung on either car. I am not prepared to charge you whether that would be an act of negligence or not. The company is bound to exercise

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due care in the operation of its cars, and it is for you to determine whether the Brush street car approaching, as it did, heavily loaded, the Baker car, passengers standing on the inside, whether the failure to ring a bell, if you find that defendant company did fail to ring a bell on the Brush street car, upon its approach, would be an act of negligence or not. I know of no rule which absolutely commands such action on the part of the railroad company, but there is a common-law liability upon the defendant, as a common carrier, to operate its cars with due regard for life and limb, not only of those who are passengers upon it, but those who pass in the street; and, if you find that the bell on the approaching Brush street car was not rung, and that that was the approximate cause of this boy's injury, I charge you that you are at liberty to determine whether or not in your opinion that would constitute an act of negligence upon the part of the defendant company. In other words, it is a question for your determination as to that feature. The plaintiff is obliged to sustain the burden of proof in this case. By that I mean to say the plaintiff must produce testimony on disputed questions of fact, which in your mind outweighs the testimony which has been produced on behalf of the defendant as to those disputed questions of fact. If she has done so, she can recover a verdict at your hands. If she has not done so, she cannot. In determining whether or not the plaintiff has sustained the burden of proof, it is proper for you to consider the interest or lack of interest of the witnesses who have been sworn before you, and determine the value that you should to their testimony. Now, gentlemen, if applying the rules I have laid down to the testimony you have heard, you should conclude the plaintiff has proven by fair preponderance of the evidence that the deceased came to his death through no negligence of his own, but through the negligent act of this defendant company, under the instructions I have given you, you will then reach the question of damages, and not until then. If you do reach the question of damages, gentlemen, I charge you that the measure of damages is the value of this boy's life to his estate from the time of his death to the time he was 21 years of age. Now that does not mean, gentlemen of the jury, that if he earned \$100 a year, we will say, over and above what it cost to keep him for the 5½ years, that would cover the period of your examination, that you would therefore bring in a verdict for \$550, because it is only the present value of his earnings that you are entitled to give him as your verdict. In other words, if the estate would be entitled to \$100 a year from to-day, it would obviously be improper to give \$100 to-day. It would be such a sum as, invested at 5 per cent., would make the \$100 from to-day, and the second year the same, and the third year the same. It is the present value of whatever you find his annual net earnings to be

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that you will return as your verdict, if you find the plaintiff entitled to recover. Now, gentlemen of the jury, because this plaintiff is the mother of a lad who has been killed unfortunately, and because the defendant is a public service corporation of reputed wealth, are themselves no reason why a verdict should be rendered for the plaintiff in this case. Neither sympathy for these bereaved parents, sorrow for the death of this lad, nor prejudice against this defendant company should have or can have anything to do with your deliberations in this case. You must approach the consideration of the disputed questions wholly free from either of those feelings, intent upon weighing the testimony fairly with an earnest desire to reach the exact truth, and determination to do justice after you have learned what that truth is. You will take this case, gentlemen, and consider it fairly, and endeavor to return a fair and honest verdict.

"Mr. Milligan: I would like to have the court instruct the jury as to the duty and care, with reference to passengers, and in reference to the roadbed, and in reference to the operation of cars in general. I also think the court stated there was no evidence as to the condition of the track. I think there were two witnesses who testified on that subject.

"The Court: No, I have the testimony, and I do not think it is worthy to be considered, Mr. Milligan.

"Mr. Donnelly: If the court please, I think that it should be made clear to the jury, before they leave the courtroom, that the plaintiff cannot go to the jury upon two inconsistent theories. The defendant is only required to meet one theory. The testimony has been such that the issue is all confused in this case.

"Mr. Milligan: I think I will object to this line of talk at this time.

"Mr. Donnelly: Take your objection, and I will go on. The point I would like to make is I think the jury should be instructed that unless they believe that extra persons did board the left-hand running board at Farmer street, and did thereby force the plaintiff out from the side of the car, and that he was not able to get back to the side of the car, unless that happened, and they believe it happened, there can be no recovery.

"The Court: Unless they should find that the failure to ring the bell, if it was not rung, was an act of negligence? That I have already given them, as plainly as I can.

"Mr. Donnelly: If that is your theory, I did not understand you yesterday. If, as a matter of fact, a man was against the side of the car, I do not see how the ringing of the bell would have anything to do with it, if he was not forced out. It would be contributory negligence surely.

"The Court: I think I will let the instructions stand. You may both have an exception. Follow an officer, gentlemen."

The jury thereupon retired to consider their verdict, and

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brought in a verdict in favor of the plaintiff in the sum of \$2,002, upon which judgment was entered on the 4th day of May, 1908. Afterwards a motion was made for a new trial based principally upon the claim that the court erred in its instructions to the jury. In overruling this motion the judge said: "I have carefully gone over the charge to the jury, and, while it is not as clear as I think it should have been, I have reached the conclusion that, taken as a whole, the jury could not be misled by it."

In addition to the foregoing, the following should appear. After the testimony was all in the following occurred:

"Jury excused while motion to direct verdict for defendant is heard.

"Mr. Donnelly: Your honor, it appears from the testimony in this case that the plaintiff got on the car at the Campus, and that the car was crowded at that time. Now, that is the claim of the plaintiff, that the car was crowded at that time; that it was not possible to get on the running board and stand in the usual, ordinary way against the side of the car; and that, if he were to get on at all, it was necessary to get on, and hang on like a burr, and project out from the side of the car. To get on a car under circumstances of that kind, and put himself into that position would be so negligent, if the court please, there can be no question but what, if a person should do that, and then be injured, they would have no right to recover.

"The Court (after discussion): I will ask you to stipulate upon the record, if upon a motion for a new trial I should conclude that I should direct a verdict at this time, I may do so.

"Mr. Milligan: All right, sir.

"The Court: In the event that you succeed in obtaining a verdict, I will submit this case to the jury simply upon this question: If this boy at the time he was struck, voluntarily, for any reason known to himself, assumed the position which caused his injury, he cannot recover. If he was forced into that position through the overpressure of passengers permitted upon the car, I will charge the jury for the purposes of this case that that would be negligence on the part of the defendant company, and would entitle him to recover. That is the only question in the case."

Counsel were told to proceed with the argument, and that they would be given 30 minutes on a side.

Counsel group the errors relied upon by appellant, as follows:

"(1) It was error for the court to instruct the jury that if they believed that defendant's employees permitted other passengers to board the car at Farmer street, particularly to the left-hand running board, in such numbers that the deceased was crowded out from the body of the car, that they might find that this was negligence on the part of the defendant.

"(2) It was error for the court to instruct the jury in effect

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that even if the deceased was not forced out from the side of the car by the crowd, but voluntarily leaned out from the side of the car, that they might nevertheless still find in favor of the plaintiff, if they believed that the bell on the Brush street car was not rung, and that it was negligence on the part of the defendant's employees not to ring it.

"(3) It was error for the court not to charge that it would be negligence for a passenger upon an open car, and particularly the deceased, to remain upon the inside running board, if in order to do so it was necessary to reach past other persons upon the running board and hang on, projecting out from the side of the car at arms' length.

"(4) It was error for the court to instruct the jury that if they believed that the bell on the Brush street car was not rung, and that this was negligence, that they might find a verdict in favor of the plaintiff after counsel for the defendant had argued the case to the jury, relying upon the statement of the court to counsel that the only question in the case which would be submitted to the jury was whether the deceased was forced into the position in which he was at the time he was struck through the overpressure of passengers permitted upon the car, or whether he, of his own volition, assumed such position.

"(5) The verdict of the jury for \$2,002 was excessive, and the jury did not follow the instruction of the court to make deduction from the amount to be awarded for present value."

As to the first three groups of assignments of error, we do not deem it necessary to discuss them at length. It is insisted the court was in error assuming that the defendant's employees were able to prevent persons boarding the car at Farmer street, and in the further assumption that they knew that such persons had boarded the car. There was a conflict in the testimony as to the number of passengers, and where they came upon the car, the effect upon the plaintiff, and what he did. There was testimony tending to show the theory of plaintiff as to how the accident happened, and what caused it to be true. The conductor had charge of the car. It was his duty to know who boarded the car. His testimony indicates that he did know and that he intended to collect fares of those on the inside running board, including the boy, as soon as he reached them in the collection of fares. As to the above assignments of error, we think they are not well taken, and that the charge of the court under the facts disclosed by the record is justified by the following authorities: *Saltzman v. Railroad Company*, 73 Hun, 567, 26 N. Y. Supp. 311; *Lehr v. Railroad Co.*, 118 N. Y. 556, 23 N. E. 889; *Geitz v. Railroad Co.*, 72 Wis. 307, 39 N. W. 866; *Reem v. Railroad Co.*, 77 Minn. 503, 80 N. W. 638, 778; *Railway Co. v. Walling*, 97 Pa. 55, 39 Am. Rep. 796; *Pray v. Street Railway Co.*, 44 Neb. 167, 62 N. W. 447, 48 Am. St. Rep. 717; *McGearty v. Railway*

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Co., 15 App. Div. 2, 43 N. Y. Supp. 1086; *Consineau v. Traction & Lighting Co.*, 145 Mich. 314, 108 N. W. 720.

As to the verdict being excessive, it is not claimed the judge erred in his charge to the jury, but it is said the jury disregarded the instructions. The record discloses that the boy was 15½ years old at the time of his death, that he earned \$10 and upwards a week, while his expenses of living were \$3 a week. It is a fair inference that from time to time as he got older and stronger and more proficient in his work his earning capacity would be increased. Under the facts disclosed by the record we do not think we would be justified in setting aside the verdict upon the ground that it was excessive. See *McDonald v. Iron & Steel Co.*, 140 Mich. 401, 103 N. W. 829.

The fourth assignment of error is more troublesome. Before the arguments of counsel were made, the judge had given them to understand that the only question he would submit to the jury was whether the boy was forced into the position in which he was at the time he was hurt by reason of the pressure of passengers who came upon the car after the boy boarded it, or whether he of his own volition assumed such position. Counsel were then directed to proceed with the argument, and were given 30 minutes on a side. In the early part of his charge the judge instructed the jury in accordance with his suggestion to counsel. It is insisted that the latter part of his charge is not consistent with that position, and that the jury were given to understand that, if they believed the bell on the Brush street car was not rung, it would be such negligence as to justify a verdict for plaintiff. Counsel insist that because of what was said by the judge they were misled, and had no opportunity to present their views to the jury upon the question of whether the bell was rung, a disputed point in the case, or what the effect was if it was not rung. This contention of counsel impresses us as being well taken. We think the instructions of the judge to which we have referred were not consistent with the statement made to counsel. See *Railroad Co. v. Monroe*, 47 Mich. 152, 10 N. W. 179.

For the reason stated, judgment is reversed and new trial ordered.

BLAIR, C. J., and GRANT and MCALVAY, JJ., concurred.

GAINES *et al.* v. CHESTER TRACTION CO.

(Supreme Court of Pennsylvania, March 8, 1909.)

[73 Atl. Rep. 7.]

Carriers—Street Railways—Collisions at Steam Railroad Crossing—Accident to Passenger.—The trolley of an electric car left the wire when the car was passing over a steam railroad crossing without negligence on the part of the street railway company, and the car was run into by a locomotive. There was nothing to show that the parting of the trolley was due to any defect in the construction or in lack of care. Held, that the passenger could not recover.

Carriers—Street Railways—Accident at Steam Railway Crossing—Evidence.—In an action for injuries to a passenger on an electric railway car by collision with an engine at a steam railroad crossing, evidence held insufficient to show any negligence on the part of the street railway.

Appeal from Court of Common Pleas, Delaware County.

Action by Charles E. Gaines and Ellen Gaines against the Chester Traction Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Argued before FELL, BROWN, MEŞTREZAT, ELKIN, and STEWART, JJ.

J. B. Hannum, for appellant.

O. B. Dickinson and *J. E. McDonough*, for appellees.

ELKIN, J. In the statement of the question involved in the paper book of appellant is contained a concise recital of the facts relied upon to sustain a recovery in this case. A trolley car of the appellant company arrived at a grade crossing over which the tracks of a steam railroad were also laid. The safety gates were down when the trolley car arrived, but were soon raised by the gate tender, who was an employee of the railroad company, thus inviting those in charge of the trolley car to pass over the crossing. Before starting his car the conductor walked ahead, as was his duty, looked up and down, saw the track was clear, and then signaled the motorman to bring the car over. While passing over the crossing, the trolley came off the wire, and the car stranded across the railroad tracks. An engine of the railroad company, standing about 70 feet distant at the time the trolley car started to make the crossing, suddenly and slowly, without warning, began to move in the direction of the crossing, and its speed being accelerated as it proceeded, and no effort seemingly having been made to stop it by those in charge of the engine, a collision with the stranded trolley car

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resulted, and a lady passenger, one of the appellees here, was injured. The trolley car was in good repair, and the tracks and overhead construction were of the kind in general use, and there is no allegation of faulty construction or of careless or insufficient maintenance.

Under these circumstances it must now be determined whether there was any evidence of negligence to submit to the jury upon which a recovery can be sustained. The rules governing the use of the crossing were carefully observed by the conductor and the motorman. They did what their duties required them to do. The safety gates were under the control of the railroad company, and when the gate tender raised them the employees of the trolley company had a right to act on the assumption that the way was clear. They did not rely on this invitation alone, but the conductor went ahead, as was his duty, to see for himself what the situation was, and, having these two sources of information, he was fully justified in signaling the motorman to start the car. Of course, even after starting the car and being committed to the crossing, the duty still rested on the conductor to take every reasonable precaution under his control for the safety of passengers; but, as we view the testimony, everything was done within his power to do as the car passed over the crossing. The evidence does not show that anything done or left undone by the conductor or motorman was in any way responsible for the stranding of the car. It is one of those things which in the operation of a street railway sometimes occurs when no one is at fault, and this was true in the present case. The conductor of the trolley car could not control the movement of the steam engine, nor could the appellant company be made liable for what the employees of the railroad company did or failed to do. Nor can we accept as sound the contention that because the steam engine made some signs of being ready to move about the time the trolley car started, or immediately thereafter, it was the duty of the conductor to stop his car and wait to ascertain what the engine might do. He had a right to assume, after the employee of the railroad company had raised the safety gates, that the way was clear so far as the engine and trains of the railroad company might interfere with the use of the crossing. A careful examination of this record has failed to convince us that there was any evidence of negligence to submit to the jury.

Judgment reversed and is here entered for defendant. ,

LOUISVILLE & N. R. CO. *v.* COTTONGIM.

(Court of Appeals of Kentucky, May 28, 1909.)

[119 S. W. Rep. 751.]

Carriers—Passengers—Ejection—Tender of Fare.*—Where plaintiff's witness testified that as he was being ejected from defendant's train, plaintiff, while having the money in his hand to pay his fare, said to defendant's conductor, "Here, I will pay you," and reached the money out, and at that time one of the trainmen had plaintiff under his arms and another had him by the legs in process of ejection, plaintiff's tender of fare was sufficient.

Carriers—Passengers—Ejection—Excessive Force—Punitive Damages.†—Where a carrier's servant, in wrongfully ejecting plaintiff, handled him in a rough manner, kicked and cursed him as he was ejected from the car, and the flagman jerked him from the train, so that he was badly bruised by the fall, the court properly permitted a recovery of punitive damages.

Carriers—Passengers—Ejection—Excessive Damages.—Plaintiff, after tendering his fare, was wrongfully ejected from defendant's train in a rough and brutal manner. He was thrown against the ground so hard that his leg was badly bruised and swollen, and remained in that condition several weeks after his ejection, and was compelled to walk while so injured a mile and a half to the next town. Held that, the court having authorized the allowance of punitive damages, a verdict for \$2,500 was not excessive.

Appeal from Circuit Court, Knox County.

"Not to be officially reported."

Action by H. P. Cottongim against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Benjamin D. Warfield, James D. Black, and J. W. Alcorn, for appellant.

James M. Gilbert and B. B. Golden, for appellee.

*For the authorities in this series on the subject of tender of passenger's fare, see second foot-note of *Louisville & N. R. Co. v. Cottongim* (Ky.), 22 R. R. R. 659, 48 Am. & Eng. R. Cas., N. S., 659, where all those preceding it are collected; fourth head-note of *Funderburg v. Augusta & A. Ry. Co.* (S. Car.), 30 R. R. R. 281, 53 Am. & Eng. R. Cas., N. S., 281.

†For the authorities in this series on the question whether exemplary or punitive damages may be recovered against the carrier for the ejection of a passenger, see foot-note of *Illinois Cent. R. Co. v. Reid* (Miss.), 30 R. R. R. 663, 53 Am. & Eng. R. Cas., N. S., 663; second head-note of *St. Louis, etc., R. Co. v. Roane* (Miss.), 30 R. R. R. 337, 53 Am. & Eng. R. Cas., N. S., 337; third head-note of *Entzminger v. Seaboard A. L. Ry.* (S. Car.), 29 R. R. R. 263, 52 Am. & Eng. R. Cas., N. S., 263; second foot-note of *Birmingham, etc., Co. v. Turner* (Ala.), 28 R. R. R. 624, 51 Am. & Eng. R. Cas., N. S., 624.

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CLAY, C. This is the second appeal of this case. On the former appeal the case was reversed for errors in the instructions. The opinion may be found in 104 S. W. 280, 13 L. R. A. (N. S.) 624. On return of the case, appellee obtained a verdict for \$2,500. From the judgment based thereon, this appeal is prosecuted.

On March 24, 1905, appellee boarded appellant's south-bound passenger train at Corbin for the purpose of going to his home at Barbourville. He had been at Corbin for quite a while and had taken several drinks. When about a mile and a half out of Corbin, the conductor in charge of the train approached appellee and called for his fare. Appellee, having no ticket, drew a silver dollar from his pocket, reached it towards the conductor, and called for his change. The conductor said, in substance: "Give me your money, and I will give you your change." Witnesses differ as to the number of times appellee reached out the dollar; but the weight of the evidence tends to show that he did this at least twice. The conductor then told appellee he would have to pay his fare or be put off the train. Failing to pay, the conductor pulled the bell cord for the purpose of stopping the train, and he and the flagman took hold of the appellee, carried him to the end of the car, and put him off.

According to the testimony for appellee the conductor grabbed him, bent his legs almost over his head, burst the buttons off his vest, and tore the vest from him. After the conductor seized him, appellee, who still held the money in his hand, said, "Here, I will pay you," and reached the money out. The witnesses differ as to the exact words used. One quotes his language as above; another testifies that appellee said, "Here's the money," while still another says appellee used the language, "Here, take it." While he was being carried out, the appellee told the conductor and flagman to stop; that they were hurting him. They were treating him in a pretty rough manner. When they reached the platform, the conductor kicked appellee and cursed him. The flagman was standing on the ground. The conductor walked down a step or two, and the flagman pulled appellee to the ground. He fell and injured his knee. His leg and knee were badly bruised and swollen. The swollen condition lasted for some weeks.

According to the testimony for appellant, appellee made no tender of his fare after the conductor and flagman took hold of him for the purpose of ejecting him from the car. Neither the conductor nor flagman remember to have heard appellee say they were hurting him. Appellee was not kicked, and they used no more force than was necessary to eject him from the train. Neither the flagman nor the conductor cursed appellee. The conductor himself, in describing the method employed in putting

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appellee off the train, used this language: "Yes; his feet fell on the ground as he (the flagman) jerked him down."

It is insisted by counsel for appellant that the court erred in submitting to the jury the question whether or not appellee made a tender of his fare after the conductor and flagman started with him to the end of the train. In support of this position, we are cited to the language of this court in the opinion on the former appeal, wherein it was said: "But there should have been a tender. A mere spoken offer to pay, in the light of what had transpired, need not have been noticed." The evidence in the record before us, however, shows more than a mere spoken offer to pay. If appellee's witnesses are to be believed, he, while having the money in his hand, said, "Here, I will pay you," and reached the money out. As one of the trainmen had him under his arms, and the other had him by his legs, he could not have well made a tender in any other way.

The court did not err in giving an instruction authorizing punitive damages. There was evidence to show that appellee was handled in a pretty rough manner; that he was kicked as he was ejected from the car; that one of the trainmen cursed him, and that the flagman actually jerked him from the train; and, furthermore, that he was badly bruised by the fall. Under the circumstances, the issue was one for the jury, and we are unable to see that their finding is flagrantly against the evidence.

It is next insisted that the verdict is excessive. Where there is evidence tending to show that the person ejected tendered his fare after the trainmen started to eject him, that they handled him in a pretty rough manner, and he was actually jerked from the train and thrown against the ground so hard, that his leg was badly bruised and swollen, and remained in that condition several weeks, and that while so injured he was compelled to walk a mile and a half to the next town, we are unable to say that a verdict for \$2,500, where punitive damages are authorized, is so glaringly excessive as to appear at first blush to have resulted from passion or prejudice. It is only in such cases that we have the power to set aside a verdict on the ground of excessive damages. *Louisville & Nashville R. R. Co. v. Ballard*, 88 Ky. 159, 10 S. W. 429, 2 L. R. A. 694; *Louisville & Nashville R. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706.

Judgment affirmed.

ARKANSAS & L. RY. CO. *v.* SAIN.

(Supreme Court of Arkansas, May 3, 1909.)

[119 S. W. Rep. 659.]

Carriers—Personal Injuries—Trespasser on Car—Burden of Proof.*

—In an action for injuries to a trespasser on a railroad train, the burden was on him to show, not only that he was in a perilous situation, but that such situation was discovered by defendant's employees, and that they failed, after that, to exercise ordinary care to avoid injuring him.

Carriers—Personal Injuries—Trespasser on Train—Instructions.—

When, in an action for injuries to a boy who went upon the platform of a car when a train stopped at a station, and was injured by the sudden backing of the train, it did not appear that he was in a perilous position when he went upon the platform, and there was no evidence to show that defendant's servants knew that he was in a place of peril, an instruction that, though he went on the car without right, if his presence there was known to defendant's servants, defendant would be bound to use ordinary care not to hurt him was erroneous.

Damages—Personal Injuries—Instructions.—In an action for the loss of plaintiff's great toe, it appeared that there was nothing left of the injury except a scar, and it did not appear that there would be any future pain after the wound had healed; a physician testifying that it might become sensitive, but that he would not say positively. The court instructed that in assessing damages the jury might consider probable loss of earnings after plaintiff reached his majority, increased expenses on account of the injury after that time, damages for past, present, and future pain and personal disfigurement. Held, that the instruction was erroneous.

Carriers—Injuries to Passengers.†—Those who go upon cars at a railway station for the purpose of meeting and assisting the incoming or outgoing passengers in such "friendly offices as may be reasonably necessary for their convenience, comfort, and safety" are upon the premises by the company's implied invitation, and are therefore not trespassers, and to them the company owes the duty of exercising reasonable care.

Carriers—Injuries to Passenger.†—One who goes upon the premises of a railway company, or upon its cars, out of mere curiosity, or for

*For the authorities in this series on the question as to who has the burden of proving actionable negligence, or its absence, irrespective of the relation between defendant and the injured person, see second foot-note of *Byrd v. Southern Express Co.* (N. Car.), 19 R. R. R. 150, 42 Am. & Eng. R. Cas., N. S., 150, where all those preceding it are collected or referred to.

†For the authorities in this series on the subject of the duties and

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the pleasure of simply meeting and greeting friends or relatives, or of seeing strangers, but with no idea or purpose of rendering any assistance to incoming or outgoing passengers, is not there upon any invitation of the company.

Carriers—Licensees.†—A custom on the part of a railway company, however long continued, to permit people to go upon its cars merely for the purpose of meeting or seeing incoming passengers, but not for the purpose of rendering them any assistance, does not constitute them anything more than naked licensees.

Carriers—Licensees.†—Where a boy 11 years of age went to a railroad station to meet the delegates to a school exhibition, the delegates being older than he, and not in his class, his purpose being, as he testified, "to see whoever came," and after he went upon the platform of a car he was injured by the sudden backing of the train, he was at most a naked licensee.

Carriers—Injury to Trespasser.—In the case of an injury to a trespasser or mere licensee on the property of a railroad, his age is immaterial on the question of defendant's negligence.

Appeal from Circuit Court, Howard County; Jas. S. Steel, Judge.

Action by Robert Jett Sain, by his next friend, against the Arkansas & Louisiana Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed, and remanded for new trial.

This is an action for personal injuries. The complaint alleges that the plaintiff is a minor 10 years of age, and that the defendant is an Arkansas corporation; that on June 16, 1908, the plaintiff, with his older brother, had gone to the depot of the defendant company at Nashville, Ark., to meet some friends, who were expected to arrive on the noon train of defendant; that when the train had arrived and stopped for the purpose of permitting the passengers thereon to alight, the plaintiff stepped onto the platform of the rear car to ascertain if the parties for whom he and his brother were looking were passengers on said train; that

liabilities of the carrier with respect to persons assisting or accompanying its passengers, see foot-note of *Charleston, etc., Ry. Co. v. Matzdorf* (Tex.), 31 R. R. R. 94, 54 Am. & Eng. R. Cas., N. S., 94; second foot-note of *Birmingham, etc., Co. v. Sawyer* (Ala.), 29 R. R. R. 779, 52 Am. & Eng. R. Cas., N. S., 779; foot-note of *Johnson v. Great Northern Ry. Co.* (Wash.), 29 R. R. R. 211, 52 Am. & Eng. R. Cas., N. S., 211.

†For the authorities in this series on the question who are, and are not, licensees on railroad cars, trains, tracks, or premises, see first foot-note of *Booth v. Union Term. Ry. Co.* (Iowa), 14 R. R. R. 768, 37 Am. & Eng. R. Cas., N. S., 768, where all those preceding it are collected or referred to; foot-note of *Metalek v. Minneapolis, etc., Ry. Co.* (Minn.), 30 R. R. R. 151, 53 Am. & Eng. R. Cas., N. S., 151; first foot-note of *Adams v. St. Louis, etc., Ry. Co.* (Ark.), 29 R. R. R. 733, 52 Am. & Eng. R. Cas., N. S., 733.

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while standing on the platform of said rear car, and while the passengers on said car were alighting, said car was negligently and violently thrown back some 8 or 10 feet, with such force as to throw the said Robert Jett Sain forward; and that he was so thrown forward, and his great toe caught between the bumpers of the car on which he was standing and the car immediately in front thereof, and by the force of the contract his said toe was greatly lacerated and cut off, from the effects of which he suffered great pain and the loss of his great toe, to his damage in the sum of \$1,000, for which he prayed judgment. The appellant answered, and admitted that the plaintiff was a minor, but averred that it had no knowledge or information of his age, and therefore did not admit that he was only 10 years of age. The answer denies further all the material allegations of the complaint, alleged that it was immaterial that the train was standing at the depot for the purpose of permitting passengers thereon to alight, and that it was immaterial that the accident occurred while passengers were alighting therefrom. The answer set up contributory negligence of the plaintiff, and that he was a mere trespasser or meddler, as affirmative defenses.

The evidence developed the following facts: Robert Jett Sain, a youth about 11 years of age, went to appellant's depot in the town of Nashville to meet some delegates that were expected to arrive on the train. He had not been sent there for the purpose of meeting the delegates. The train had been stopped two or three minutes. He got upon the platform between the coaches for the white and colored people. He was in three or four feet of the brakeman, who was there when he got upon the platform of the coach. The train backed suddenly, and then stopped, and that threw him forward upon the white people's coach, and his great toe was caught between the bumpers of the two cars. The delegates, who were taking part in a school contest, were not in his class, but they were older than he. He went to see whoever came. He could have seen them get off without going on the train. He did not know that the train bumped up when it moved backward and forward; did not know how the train worked. He was barefooted; did not know how it was that his toe was caught without his whole foot being caught. It was shown that the toe was badly mashed, and the tip of the bone pinched off. The doctor attended him 10 or 12 days, and the boy suffered greatly. There was a scar that would probably be permanent. With that exception, the physician did not "see that it would trouble him after he reached his majority." It was shown that the train had come to a stop for three or four seconds. Some of the passengers had gotten off, and others were trying to get off, when the train backed the first time. There was a violent backing, the train started back very suddenly, and stopped. They backed three times or more before making a successful coupling, while

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the passengers were attempting to get off. The youth testified, over appellant's objection, that he had gone to the train often before to meet people; that he did so whenever he wanted to meet anybody; that he had gone there a number of times to meet his father and brother, and had always gone on the train to meet them, and he did not think that any of the employees ever objected to his doing so. It was shown by the father of the injured lad, over the objection of appellant, that it had been the habit of his children to always meet him at the depot when he came home, for 10 or 15 years. "They all come," says he, "and get on the platform to meet me. My two little boys and youngest girl have made it a habit to get up on the train. I have noticed other people, but my children especially; never heard a word of objection from any of the employees."

It was shown on behalf of appellant that its employees were doing on this occasion as they usually do when they have box cars in the train. The slack was taken up in the train, so that the pin was tight, and the head brakeman "gave the engineer the slack signal, and he gave a little slack." The brakeman gave an easy slack signal, and the engineer came back as easy as he could to pull the pin. The brakeman did not see the plaintiff when the signal was given, did not know that he was there. It was customary to cut the cars off in the way they were doing that day. The brakeman knew that passengers were getting off the train at the time the accident occurred; he was assisting them off. "The back action was not very quick, just a gradual moving back." The witness testified: "It is not a fact that people who are getting relations go there every day and get on that train, and I never open my mouth about it. They don't get on that train when I see them. We tell people not to get on the train who have no business there." There was a sign at the depot reading, "No trespassers allowed." It is a warning for trespassers to keep away. The witness did not remember when he last saw it, and would not say that it was there at the time of the trial. If it had been moved, witness did not know it. There is a sign on the passenger coach door which reads: "Passengers are not allowed to ride on the platform." The platform is for persons to get on and off the train. It is not there for persons to stand on the platform. There is no danger on the platform when the train is standing still.

The court, over the objection of appellant, gave, among others, the following prayers for instructions at the instance of appellee:

"(6) Although the jury may believe from the evidence that the plaintiff had gone upon defendant's car without right, yet if you believe his presence there was known to the employees of the defendant, then the defendant would be bound to use ordinary care not to hurt him.

"(7) If you find for the plaintiff, you may assess his damages

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at whatever sum you believe the evidence shows that he has sustained; and, in arriving at this, you may take into consideration his probable loss of earnings after he reaches his majority caused by the injury, if you find there is any probable loss, and the increased expenses he will probably incur on account of the injury after that time, if any, and damages for his past, present, and future pain, if any, caused from said injury, and for his personal disfigurement, if any."

Other instructions were given at the instance of appellee, and also the appellant, but it is unnecessary to set them out here. The jury returned a verdict for \$250 in favor of plaintiff. Judgment was rendered for that amount, and this appeal has been duly prosecuted.

E. B. Kinsworthy, Lewis Rhoton, and W. C. Rodgers, for appellant.

W. P. Feagel, Sain & Sain, and T. D. Crawford, for appellee.

WOOD, J. (after stating the facts as above). Instruction No. 6 was erroneous. Appellee testified that the train "had been stopped two or three minutes" when he got upon the platform; and the testimony on behalf of the appellant showed that there was "no danger on the platform when the train is standing still." Appellee testified that he "was in three or four feet of Faust Mulkey, the brakeman, when he got upon the platform of the coach;" but he does not say that this brakeman was looking at him, or that the brakeman saw him on the platform. Brakeman Mulkey, on the contrary testified that he did not see him on the platform before he was hurt. The above testimony was hardly sufficient to warrant the court in submitting to the jury the question as to whether or not appellee's presence on the platform was known to the employees of the appellant. But if the testimony was sufficient for that purpose, and sufficient to sustain a finding that appellee's presence on the platform was known to the employees of the appellant, there is no evidence that appellee was in a perilous situation when he went upon the platform, or that the employees knew that he was in danger at the time he was injured. The instruction tells the jury that, although appellee may have been a trespasser, yet if his presence was known to the employees of appellant, the latter would be bound to use ordinary care not to hurt him. This is not the law. If the appellee was a trespasser, the burden was upon him to show, not only that he was in a perilous situation, but that such situation was discovered by the employees of appellant, and that they failed after that to exercise ordinary care to avoid injuring him. It is not enough that his peril might have been discovered by the exercise of ordinary care. He must show that they actually discovered his peril in time to have avoided injury. *St. L., I. M. & Sou. R. Co. v. Freeman*, 36 Ark. 41; *St. L. & S. F. R.*

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Co. v. Townsend, 69 Ark. 380, 63 S. W. 994; Burns v. St. L. S. W. R. Co., 76 Ark. 10, 88 S. W. 824; Barry v. K. C., Ft. S. & M. R. Co., 77 Ark. 401, 91 S. W. 748. See, also, St. L., I. M. & S. R. Co. v. Taylor, 64 Ark. 364, 42 S. W. 831; St. L., I. M. & S. R. Co. v. Raines, 86 Ark. 306, 111 S. W. 262. "A railroad company owes trespassers no contract duty." The general rule is that it owes them no positive duty or care, and only the negative duty not to willfully or wantonly injure them, or the duty to exercise ordinary care not to injure them after discovering their danger and inability to escape. 3 Elliott on Railroads, §§ 1254, 1255. See 2 Hutchinson on Carriers, § 990, and note; C., B. & Q. R. Co. v. Mehlsack, 131 Ill. 61, 22 N. E. 812, 19 Am. St. Rep. 17; St. L., I. M. & S. R. Co. v. Ledbetter, 45 Ark. 246; Adams v. St. L., I. M. & S. R. Co., 83 Ark. 300, 103 S. W. 725; L. R. & M. R. Co. v. Russell (Ark.), 113 S. W. 1021; Catlett v. Ry. Co., 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254. There was no evidence that appellee was in a perilous situation when he went upon the platform, and no evidence that the employees of defendant knew that he was in a place of peril, even if such fact existed. The testimony is to the contrary. There was evidence that tended to show that appellee went upon the platform of appellant's car without right. The instruction was therefore not only erroneous for the reasons stated, but was prejudicial.

Instruction No. 7 was abstract in some particulars. There was no evidence of any probable loss of earnings after appellee reached his majority on account of the injury. There was nothing left of the injury, according to the evidence, except a scar; and it is not shown that the scar would diminish appellee's earning power after he reached his majority, nor that he would incur any additional expense on account of the injury after that time. Nor, indeed, is it shown that there would be any future pain after the wound had healed. It might become sensitive, but the doctor "couldn't tell about that." The instruction on the measure of damages was therefore erroneous. Under it the jury could roam in a realm of speculation. But for these improper elements which the jury were told they could consider, their verdict may have been for a less sum. Who can tell? The instruction was therefore prejudicial.

A discussion of the law applicable to the facts will indicate what the rulings of the court should have been upon other prayers for instructions, and upon such rulings as we deem material on the admissibility of evidence.

Those who go upon cars at a railway station for the purpose of meeting and assisting the incoming or outgoing passengers in such "friendly offices as may be reasonably necessary for their convenience, comfort, and safety" are upon the premises of the railway company by its implied invitation, and are therefore not

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trespassers. *St. L., I. M. & S. R. Co. v. Grimsley* (Ark.), 117 S. W. 1064; *Ry. Co. v. Lawton*, 55 Ark. 428, 18 S. W. 543, 15 L. R. A. 434, 29 Am. St. Rep. 48; *St. L., I. M. & S. R. Co. v. Tomlinson*, 69 Ark. 489, 64 S. W. 347. To such an one, the railway company undoubtedly owes the duty of exercising reasonable care. 3 *Elliott on Railroads*, § 1256; 2 *Hutchinson on Carriers*, § 991 (553a). But one who goes upon the premises of a railway company, or upon its cars, out of mere curiosity, or for the pleasure of simply meeting and greeting friends or relatives, or of seeing strangers, but with no idea or purpose of rendering any assistance to incoming or outgoing passengers, is not there upon any invitation of the company, for such an one cannot be said to be directly or remotely upon any mission, or engaged in any business, connected with the interest of the company. *Ry. Co. v. Lawton*, 55 Ark. 428, 18 S. W. 543, 15 L. R. A. 434, 29 Am. St. Rep. 48; *St. L., I. M. & S. R. Co. v. Tomlinson*, 69 Ark. 489, 64 S. W. 347. If the company permits persons to go upon its premises or its cars for the purpose last above indicated, such persons are not trespassers, but licensees. They are not, however, upon the company's platform or car "to welcome the coming or speed the parting guest" in the sense of the law, and are therefore nothing more nor less than bare licensees. To bare licensees railroad companies owe no affirmative duty of care, for such licensees take their license with its concomitant perils. *Cusick v. Adams*, 115 N. Y. 55, 21 N. E. 673, 12 Am. St. Rep. 772; *Carr v. Mo. Pac. R. Co.*, 195 Mo. 214, 92 S. W. 874; *Ry. Co. v. Tomlinson*, 69 Ark. 489, 64 S. W. 347; *Nor. & Wes. Ry. Co. v. Wood*, 99 Va. 156, 37 S. E. 846. A custom upon the part of a railway company, however long continued, to permit people to go upon its cars merely for the purpose of meeting or seeing incoming passengers, but not for the purpose of rendering them any assistance, does not constitute those who go upon the cars in pursuance of such custom anything more than naked licensees. They are not licensees upon invitation, but simply by passive permission. An invitation upon the part of the company is implied where one goes upon its cars to render some needed assistance to passengers, for the reason that such service to the passengers is considered to be in the interest of the company as well. *Ry. Co. v. Lawton*, 55 Ark. 428, 18 S. W. 543, 15 L. R. A. 434, 29 Am. St. Rep. 48.

Now there is no evidence that young Sain went upon the platform for the purpose of meeting or assisting the incoming passengers. He says he went down to meet the delegates to the school exhibition, but he had not been sent there for any purpose. He went "to see whoever came." The delegates who were taking part in the school contests, were older and larger than he. They were not in his class. His older brother, a grown young man, was one of the committee to meet the delegates, and went

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to the depot for that purpose. The going of appellee to the depot merely for the purpose of meeting the delegates did not show that the appellant owed him any positive duty of care, for his meeting of the delegates may have been prompted by idle curiosity or some purely selfish motive that was of no concern to appellant. The burden was upon appellee, and he fails to show that he was upon appellant's car by any invitation, express or implied. On the contrary, the evidence, viewed in its strongest light for appellee, makes him at most only a naked licensee. The court, therefore, erred in sending the cause to the jury upon instructions that would warrant them in finding that appellee was upon the platform of appellant's car by implied invitation, and that, if so, appellant owed him the duty to exercise ordinary care to avoid injuring him.

If appellee was a trespasser or a mere licensee, then the question of his age was wholly immaterial, for in such case, as we have seen, appellant would not be liable, unless it had discovered that appellee was in a position of peril from which he could not extricate himself, and then failed to exercise ordinary care to avoid injuring him. *McEachern v. B. & M. R. R. Co.*, 150 Mass. 515, 23 N. E. 231; *Vertrees v. Newport News, etc., Co.*, 5 Ky. 314, 25 S. W. 1; *McDermott v. Ky. Cent. Ry. Co.*, 93 Ky. 408, 20 S. W. 380; *Frost v. Eastern Ry. Co.*, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396.

There was no showing in this case of appellant having held out any inducements or allurements to have appellee go upon its cars. See *Cusick v. Adams*, 115 N. Y. 55, 21 N. E. 673, 12 Am. St. Rep. 772.

For the errors in the court's rulings, the judgment is therefore reversed, and the cause remanded for new trial.

ST. LOUIS & S. F. RY. CO. *v.* GOSNELL.

(Supreme Court of Oklahoma, May 12, 1909.)

[101 Pac. Rep. 1126.]

Carriers—Carriage of Passengers—Freight Trains.*—Where a railroad company carries passengers for hire on its freight trains, it must exercise the same degree of care as is required in the operation of its regular passenger trains; the difference only being that the passenger submits himself to the inconvenience and danger necessarily attending that mode of conveyance.

Carriers—Carriage of Passengers—Freight Trains—Negligence.—Plaintiff took passage for hire on defendant's freight train from S. to L., and took a seat in the "caboose." Just before reaching C., an intermediate station, the engine stopped at a water tank about 150 yards from the depot, when plaintiff, thinking it had reached the station, stepped out on the rear platform to talk to a friend seated on the car steps. Finding it had not reached the station, plaintiff, when the train started again, stepped back in the "caboose" on the way to his seat, and turned and was standing with his hands against the casings of the rear door when the train suddenly stopped at the depot with such jar that he was knocked off his feet and injured. Held, that from these facts no inference of negligence on the part of the railroad company could be legitimately drawn, and that a motion to direct a verdict for defendant should have been sustained.

(Syllabus by the Court.)

Error from District Court, Comanche County, F. E. Gillett, Judge.

Action by S. N. Gosnell against the St. Louis & San Francisco Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Flynn & Ames and *R. A. Kleinschmidt*, for plaintiff in error.

McElhoes & Ferris and *Ahren & McDaniels*, for defendant in error.

TURNER, J. On April 28, 1904, S. N. Gosnell, defendant in error, plaintiff below, sued the St. Louis & San Francisco Railway Company, plaintiff in error, defendant below, in the district court of Comanche county in damages for personal injuries alleged in his amended petition to have been by him sustained on or about August 21, 1903, on which date he says he became a passenger for hire on defendant's railway from the

*See first foot-note of *St. Louis, etc., Ry. Co. v. Brabbzson* (Ark.), 30 R. R. R. 625, 53 Am. & Eng. R. Cas., N. S., 625; fourth foot-note of *Tinkle v. St. Louis & S. F. R. Co.* (Mo.), 30 R. R. R. 470, 53 Am. & Eng. R. Cas., N. S., 470.

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town of Snyder to the town of Lawton, in this state; that as such he took passage on one of defendant's regular freight trains with "caboose" attached, which, upon its arrival at the town of Cache, "was stopped by defendant negligently and willfully and with a sudden and terrific jar and with such force, violence, wantonness, and negligence on the part of defendant that plaintiff without any fault on his part was thrown violently and forcibly against a box," and seriously injured, for which he prayed judgment for \$5,000. For answer defendant pleaded a general denial, a specific denial of negligence, and contributory negligence. There was trial to a jury which resulted in a judgment for plaintiff for \$750, to reverse which, after motion for a new trial filed and overruled, defendant brings proceedings in error to this court. At the close of the testimony on both sides defendant moved the court to direct a verdict for defendant, which was overruled, and this is assigned as error.

There is no material conflict in the testimony. The evidence discloses that plaintiff, aged 51 years, lived at Frederick; that, while on his way to Lawton, he took passage for hire on defendant's freight train at Snyder, and, with several others, took seats in the "caboose" attached to the rear end; that said train consisted of 14 cars 35 feet long in addition to an engine and tender; that just before reaching Cache, an intermediate station, and after the train had passed into the switches, the engine stopped at a water tank about 150 yards from the depot; that plaintiff, who was seated looking out the open back door of the caboose, thinking the train had reached the station, stepped out on the rear platform of said car to talk to a fellow passenger seated on the car steps; that finding it had not reached the station, plaintiff, when the train again started up, which it did in a very short time, stepped back into the caboose on his way to his seat, and turned and was standing with his back to the engine and his hands against the casings of the rear door, when the train, with the caboose opposite the depot platform, suddenly stopped with such a jar that plaintiff was knocked off his feet and his back injured in the fall against the corner of a box used for a seat; that three of his ribs were broken, in consequence of which he was confined to his room for two weeks and incurred a bill of \$4.50 for medical services; that none of the passengers sitting down were hurt, but two among others who were standing were also knocked down by the jar. As to the character of the stop plaintiff testified: "Q. Are you familiar with the way freight trains start and stop? A. Yes, sir; I think so. I takes rides on them good deal at that time. Q. How was this? A. It was harder." Another witness, a passenger, said: "It stopped very suddenly. It was a very hard jar. It was much harder than ordinary. It came very near shoving me out of my seat." And finally stated: "A.

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Well, the train stopped very suddenly as I told you. The jerk was harder than ordinary. I have felt as hard jerks on a freight train I have ridden on, but this was something very uncommon. The jerk was very hard." On cross-examination he said: "Q. And you say you have observed other jars on freight trains that were just as sudden as this? A. O, yes. Q. The train in pulling up from one stop to the other didn't reach a speed of over three or four miles an hour at any point? A. No; I think not. Of course, it didn't go very fast. Q. Just pulling about its length? A. Yes, sir. Q. The jar from the stop was just about such a jar as usually results when the slack runs out of any train? A. No; I don't say that. I said it was something uncommon. I have felt such a jar, but it was an uncommon thing." Another passenger said: "It seemed unusually hard. It was more severe. It was a little extraordinary, I think." A passenger seated in the cupola of the caboose said: "The jar that caused this party to fall was not an unusually severe hard one. Nothing more than usually occurs on freight trains." This is substantially all the evidence on this point.

Was there sufficient evidence of negligence to take the case to the jury? We think not. It is well settled, as said by the court in *Wait v. Omaha, K. C. & E. Ry. Co.*, 165 Mo. 612, 65 S. W. 1028, that, where a railroad company carries passengers for hire on its freight trains, "it must exercise the same degree of care as is required in the operation of its regular passenger trains; the difference only being that the passenger submits himself to the inconvenience and danger necessarily attending that mode of conveyance. *Whitehead v. St. Louis, I. M. & S. Ry. Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409; *McGee v. Mo. Pac. Ry. Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706; *Wagner v. Mo. Pac. Ry. Co.*, 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156; *Hays v. Wabash Ry. Co.*, 51 Mo. App. 438; *Guffey v. Han. & St. J. Ry. Co.*, 53 Mo. App. 462; *Ohio & Miss. Ry. Co. v. Dickerson*, 59 Ind. 317; *Chicago & Alton Ry. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313; *Olds v. New York, etc., Ry. Co.*, 172 Mass. 72, 51 N. E. 450." And, as stated in *Chicago & Alton Ry. Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 313: "Persons taking passage upon freight trains, or in a caboose or car attached to a freight train, cannot expect or require the conveniences or all of the safeguards against danger that they may demand upon trains devoted to passenger service, and are accordingly held to have accepted the accommodations provided by the company, subject to all the ordinary inconveniences, delays, and hazards incident to such trains when made up and equipped in the ordinary manner of making up and equipping such trains, and managed with proper care and skill? * * * But, if a railway company consents to carry passengers for hire by such trains, the general rule of

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responsibility for their safe carriage is not otherwise relaxed. From the composition of such a train and the appliances necessarily used in its efficient operation there cannot in the nature of things be the same immunity from peril in traveling by freight train as there is by passenger trains, but the same degree of care can be exercised in the operation of each. The result in respect of the safety of the passenger may be wholly different because of the inherent hazards incident to the operation of one train, and not to the other, and it is this hazard the passenger assumes in taking a freight train, and not hazard or peril arising from negligence or want of proper care of those in charge of it." Applying these principles to the case in hand, what right have we in the light of evidence to attribute the injuries sustained by plaintiff to the negligence of the defendant rather than to the dangers necessarily attending the mode of conveyance adopted and which were assumed by plaintiff on taking passage? None whatever. There is nothing in the evidence which tends to prove other than the mere fact that the injury resulted from a jar caused by the taking up of the slack in the train on the stopping of the engine. It is contended by defendant that proof of the mere factum of the jar is not sufficient to send the question of negligence to the jury. In this we concur. In order to show negligence, it is not sufficient to prove the mere fact that plaintiff was injured by a jerk in the movement of the train or by a jar occasioned by its stopping. Such is not negligence *per se* or sufficient to justify its inference. In *Edwin v. Railway Co.*, 94 Mo. App. 289, 68 S. W. 88, the court said: "When the fact that there is more or less jerking, and jolting incident to the operation of a freight train—a matter of common knowledge—is taken into view, negligence cannot be inferred from the mere fact that the plaintiff was injured by a jar occasioned by the stopping of the train. *Carvin v. St. Louis*, 151 Mo. 334, 52 S. W. 210; *Wait v. Railroad*, 165 Mo. 612, 65 S. W. 1028. The rule of *res ipsa loquitur* can only be applied where there is something which, if unexplained, tends to show that some negligence or omission of duty was the proximate cause of the injury. *Gallagher v. Edson Ill. Co.*, 72 Mo. App. 576."

The following cases support this doctrine. See, also, *Rockford, etc., Ry. Co. v. Coultas*, 67 Ill. 398; *N. & W. R. R. Co. v. Furguson*, 79 Va. 241; *L. & N. Ry. Co. v. Bisch*, 120 Ind. 549, 22 N. E. 662; *Frohriep v. Lake Shore, etc., Ry. Co.*, 131 Mich. 459, 91 N. W. 748; *Railroad Co. v. Humphrey*, 83 Miss. 721, 36 South. 154; *Timms v. Old Colony Ry. Co.*, 183 Mass. 193, 66 N. E. 997; *Birmingham N. Ry. Co. v. Hale*, 90 Ala. 8, 8 South. 142, 24 Am. St. Rep. 748; *Chicago & Western Indiana Ry. v. Bingenheimer*, 14 Ill. App. 125; *Herstine v. Lehigh Valley Ry. Co.*, 151 Pa. 245, 25 Atl. 104; *Allen v. Northern Pac. Ry. Co.*, 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804; *Johnson*

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v. Interurban St. Ry. Co. (Sup.), 88 N. Y. Supp. 866; *Denver & Rio Grande Ry. Co. v. Fotheringham*, 17 Colo. App. 410, 68 Pac. 978; *Conroy v. Detroit, etc., Ry. Co.*, 139 Mich. 173, 102 N. W. 641, 104 N. W. 319; *Byron Adm'x v. Linn, etc., Ry. Co.*, 177 Mass. 305, 58 N. E. 1015. In *Wait v. Railway Co.*, 165 Mo. 612, 65 S. W. 1028, the facts were that plaintiff boarded defendant's freight train below the depot, thinking it would stop at the depot. After it had started up with sufficient speed to indicate that it was "off," plaintiff got out of his seat and stepped into the aisle to pull on his overcoat; that train suddenly stopped, and he was thrown against the seat and badly injured. The court in the syllabus said: "There was no evidence tending to show any defect in the track, train, or its appliances, or any want of skill or care on the part of the trainmen, or that the train was stopped at an improper place, or in an improper manner, or that the shock which caused the plaintiff's fall was not a natural and ordinary incident to a proper stopping of the train. Held, that the court properly sustained a demurrer to the evidence; there being no fact proved from which an inference of negligence on the part of the railroad company could be legitimately drawn." *Hawk v. Railway*, 130 Mo. App. 658, 108 S. W. 1119, was a suit in damages for personal injuries alleged to have been caused by the negligence of the carrier. The facts were that plaintiff purchased a ride to Hamilton, and took passage on its freight train consisting of an engine and 20 cars. At Breckinridge, an intermediate station, the train took a side track for another train to pass, and stopped so suddenly that plaintiff, who was 75 years old, was thrown to the floor and injured. At the time he said he was seated with his face towards the east end of the car, and while in that position was thrown down by what he described as "a terrific shock sufficient to knock a man off his feet, and knock him senseless for a while." In the fall his head struck with sufficient violence to render him unconscious. Two witnesses testified that, before the car came to a stop, plaintiff had left his seat, and proceeded to the east door, where he stood looking east with his hands on the door jamb, when the sudden stopping of the train threw him backward to the floor. In passing, the court, in determining the question of whether or not a demurrer to the evidence should have been sustained, said: "It is a matter of common knowledge that in starting and stopping such unwieldy trains sudden jolts and jars of varying degrees of violence are ordinary incidents even where such trains are handled with the greatest care. As such occurrences cannot be avoided in the exercise of due care, the rule is well settled that passengers assume the risk of injury by them as one of the perils of travel by that mode of conveyance. The fact that a sudden and violent jolt or jar accompanies the stopping of a freight train *ipso*

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facto will not raise a presumption of negligence. A passenger injured thereby to be entitled to recover from the carrier must go further; he must adduce the facts from which an inference of negligence fairly arises." *Hedrick v. Railway*, 195 Mo. 104, 93 S. W. 268. *Young v. Mo. Pac. Ry. Co.* (Mo. App.), 84 S. W. 175, was a suit to recover damages for personal injuries sustained by plaintiff while a passenger riding on a stock pass in the caboose of defendant's freight train. The facts were that on July 11, 1901, while in transit, the train stopped in St. Louis, and one of the defendant's employees in charge of it announced the station and called to plaintiff to "get out"; that plaintiff in obedience thereto rose from his seat in the caboose, and started to leave the train, but before he had time to do so it, without warning, started with a violent jerk which threw him down and severely injured him and knocked other passengers from their feet, or, to use an expression of one of the witnesses, "knocked them around promiscuously." There was a demurrer to the evidence which the trial court overruled, and which on appeal the Supreme Court held to be error and in passing said: "One who travels on a freight train assumes the risks thereto—as for example, risks of injury from jerks or jolts incident to the movement of such trains. *Elliott on Railroads*, § 1582; *Erwin v. Railway Co.*, 94 Mo. App. 296, 68 S. W. 88. Negligence cannot be inferred from the mere fact that one has been injured from a jerk or jolt caused by the stopping or starting of such trains, since it is common knowledge that there is more or less jerking and jolting incident to the movements of them." The plaintiff must go further in proof of negligence than merely show that he was injured as a result of a jerk in the movement of defendant's train is thus stated in *Sexton v. Railroad*, 98 Mo. App. 503, 72 S. W. 720: "There was no evidence adduced which tended to prove that the jerk was unusual, extraordinary, or unnecessary, and not usually incident to the ordinary, careful, and efficient operation of the train. It was not enough to prove that there was a jerk in the movement of the train. One of the plaintiff's witnesses testified that it seemed to him that the jerk occurred when the train took up the slack, but it does not affirmatively appear, as it should, to show liability, that the jerk was an extraordinary or unusual one, attributable to a defect in the track, an imperfection in the car or apparatus, or to a dangerous rate of speed, or the unskillful handling of the engine by the engineer, or to something of that kind. *Bartley v. Railroad*, 148 Mo. 139, 49 S. W. 840; *Hite v. Railway*, 130 Mo. 136, 31 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 555, and other cases cited." As in that case so in the case at hand. While it is not controverted that the jar occasioned the injury, it does not affirmatively appear, as it should in order to send the question

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of negligence to the jury, that the same was of extra severity and directly attributable to the negligence or careless handling of the engine by the engineer. In the absence of such evidence, we can but presume that the engineer did his duty, and that the sudden stop of the train and the jar which caused the injury arose from exigencies of the service. In arriving at such conclusion and that the jar caused by the stopping of the train was not *ipso facto* negligence, and hence the proof insufficient to take the question of negligence to the jury, we are not unmindful of the testimony of the passengers as to the character of the stop, but the same has no weight with us for the reason that the probative force thereof is nil, are mere expressions of opinion, and should not be considered in determining the question of the negligence of the defendant. As to such expressions we can say as was said of similar expressions of witnesses in *Guffey v. Railway Co.*, 53 Mo. App. 466, where the court said: "We do not think these expressions of the witness are of any value whenever, or stated as much as a scintilla of evidence." In *Young v. Mo. Pac. Ry. Co.*, *supra* the court said: "It is true the plaintiff and his three witnesses testified their opinion to the effect, that the 'train made a heave forward just like lightning,' that 'it was an awful hard jerk,' and that 'the jerk was the most severe I have ever experienced.' Of course, the manifestly hyperbolical expression of opinion that 'the train heaved forward just like lightning' as evidence cannot be given the weight of a feather. The other expressions of the witnesses prove nothing. The jerks or lurch may have been 'awful hard' or the 'severest' the witness had ever experienced, and yet not that extraordinary or unusual jerk or lurch attributable to unskillful handling of the engine, or something of the kind. There was no fact proved to justify the inference that the jerk resulted from negligence." In *Hawk v. Railway*, *supra*, the court said: "We do not find any evidence in the record before us from which it may be said with reason that the jolt which accompanied the stopping of the train was extraordinarily violent. Plaintiff depicts it as a 'terrible shock,' 'a severe shock sufficient to knock the breath out of me,' but these expressions of a non-expert witness amount to nothing more than mere conclusions and possess no probative value."

In this view of the case it becomes unnecessary to discuss the question of contributory negligence or instruction 6, given to the jury over the objection of defendant, wherein the court charged, in substance, that, if the jury found that the injury complained of resulted from the "willful negligence" of defendant, the jury might assess punitive damages further than to say that, defendant not being chargeable under the evidence with any negligence whatever, it certainly was not guilty of "willful negligence," whatever that may mean. As the burden was on the plaintiff to

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prove negligence as alleged in his petition, and as in this we think he failed, we are of the opinion that the court erred in overruling the motion to direct a verdict for defendant, and for that reason the case is reversed and remanded for a new trial. All the Justices concur.

LOUISVILLE & N. R. CO. v. SEALE.

(Supreme Court of Alabama, April 15, 1909.)

[49 So. Rep. 323.]

Carriers—Carriage of Passengers—Stopping at Destination.*—The taking up by a conductor of a ticket to a flag station is sufficient notice to him that the passenger desires to get off at that station, and it is the duty of the conductor to take up the tickets within a reasonable time after leaving a station.

Carriers—Carriage of Passengers—Stopping at Station—Questions for Jury—Taking up Tickets.—Evidence in an action by a passenger for being carried by her destination held to make the question whether the conductor had had a reasonable time after leaving the station in which to take up tickets a question for the jury.

Carriers—Carriage of Passengers—Stopping at Destination—Actions—Admissibility of Evidence.—In an action by a passenger for being carried beyond her destination, it was proper to allow a witness to answer the question as to what became of plaintiff immediately after she came to witness' house, as the answer had a bearing on the condition of plaintiff, and evidence as to what the rules of the company are as to where passengers get on and off the train is admissible, as bearing upon the questions whether employees knew that plaintiff had boarded the train and whether she had had an opportunity to inform the employees of her destination; and evidence as to what was the custom and usage of defendant about trains leaving the station at which plaintiff boarded the train was also admissible, but testimony of a witness that this was the first time he had ever seen a passenger carried by a flag station is inadmissible.

Trial—Presentation of Evidence—Necessity for Objecting.—Where an answer is responsive to a question, an objection cannot be made to the answer, where no objection has been made to the question.

Carriers—Carrying Passenger Past Destination—Instructions.—In an action against a carrier for carrying a passenger past her destination, the court properly refused to charge that if plaintiff, after being carried past her station, got off the train voluntarily, and was not put off by defendant's agents or servants, or some of them, the jury must bring in a verdict for defendant.

Trial—Instructions—Falsity of Testimony.—An instruction that, if

*See extensive note, 1 R. R. R. 904, 24 Am. & Eng. R. Cas., N. S., 904.

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the jury believed from the evidence that any witness willfully swore falsely to any material fact in the case, they may disregard his, her, or their entire testimony, is not erroneous, as it means that the jury are at liberty to disregard only the testimony of the witness who has sworn falsely, and not the testimony of all the witnesses, as claimed by appellant.

Appeal from Circuit Court, Shelby County; John Pelham, Judge.

Action by Delia Seale against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The court refused the following charge to the defendant: "(C) The court charges the jury that if the plaintiff, after being carried beyond Dean's Station, got off the train voluntarily, and was not put off by defendant's agent or servant, or some of them, they must bring a verdict for the defendant."

The following charge was given for the plaintiff: "(A) Gentlemen of the jury, if you believe from the evidence that any witness willfully swore falsely to any material fact in this case, then you may disregard his, her, or their entire testimony."

Whitson & Harrison, for appellant. *Walker R. Oliver and Frank & S. White & Sons*, for appellee.

SIMPSON, J. This suit was brought by the appellee against appellant to recover damages for being carried beyond her destination as a passenger on defendant's railroad. The facts, as detailed by the plaintiff herself, are that she purchased a ticket from Calera to Dean's Station, a distance of about three miles; that she boarded the car at the railroad crossing, after which the train moved to the "old depot," where passengers usually got on, and remained in her seat; that the conductor did not come around for her ticket until the train had passed Dean's Station about a mile and a quarter, when he stopped the train, on discovering her destination, but refused to go back to Dean's Station, and she got off there. She stated that she had traveled between the two points frequently, was familiar with the locality, and knew when the train was approaching that station; that the flagman was in the car, very near to her, when the train was approaching Dean's Station, and had been, all the time, yet she did not inform him or any one else that she wished to stop there, because, as she testifies, "I did not think it was my place"; that the first time she saw the conductor was shortly after the train had passed the station; that she did not say anything to him, but made a slight motion with her hand, and waited till he reached her in the regular course of taking up the tickets. The conductor testified that he commenced taking up the tickets in the front car, accord-

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ing to custom, shortly after leaving Calera, was delayed in the smoker a short time by some drunken men, who were long in finding their tickets, etc., and then proceeded as rapidly as possible, reaching the front end of plaintiff's car (she being on a rear seat) just before they reached Dean's Station, and that he did not see her make any sign. He was corroborated by the "news butcher" and the flagman.

While it may be that, under the peculiar circumstances of this case, it was the duty of the passenger who had a ticket to a flag station to inform the conductor or some employee of the company that she desired to get off at that station, yet the taking of the ticket by the conductor is sufficient notice to him, and it is his duty to take up the tickets within a reasonable time after leaving stations; and in this case it was a question for the jury to determine whether or not the conductor had had a reasonable time, after leaving Calera, in which to take up the tickets. Consequently there was no error in the refusal to give the general charge in favor of the defendant. *Chattanooga, etc., R. v. Lyon*, 89 Ga. 16, 15 S. E. 24, 15 L. R. A. 857, 32 Am. St. Rep. 72.

There was no error in permitting the witness Mrs. Sara Martin to answer the question, "What became of Mrs. Seale immediately after she came to your house?" The answer was proper for showing the condition of the plaintiff.

The court did not err in overruling the objection by defendant to the answer by the witness Miss Olia Martin to the question, "State what the custom is as to how the train stops," etc., because no objection was made to the question, and the answer was responsive to the question.

There was error in sustaining the objection to the question to the witness Roy Oliver, "What is the rule of the company as to where passengers get on and off the train?" as it has a bearing upon the question as to whether the employees know that plaintiff had boarded the train, and also upon that as to whether she had had an opportunity to inform the employees of the company of her destination. For the same reasons, there was error in sustaining the objection to the question to the same witness, "What was the custom and usage of the L. & N. about trains leaving Calera?"

As to the objection to the question by plaintiff's counsel, "Suppose they did not see any of the crew," etc., great latitude is allowed on cross-examination; and the answer, at any rate, was that the witness did not know the rule. Hence there was no error in overruling the objection.

The court erred in permitting the witness Oliver to testify that this was the first time he had ever seen a passenger carried by a flag station, as this case must be tried on its own merits, without regard to what was done in other cases.

Charge C, requested by the defendant, was properly refused. *Southern Railway Co. v. Sallie Meilton*, 47 South. 1008.

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Charge A, given on request of plaintiff, is not accurately expressed; but we think its meaning is clear to the effect that the jury were at liberty to disregard the testimony only of the witness who had sworn falsely, and not the testimony of all the witnesses, as appellant construes it.

It is unnecessary to consider the motion for a new trial. The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and MAYFIELD, JJ., concur.

WARD v. CHICAGO CITY RY. CO.

(Supreme Court of Illinois, Dec. 15, 1908. Rehearing Denied Feb. 4, 1909.)

[86 N. E. Rep. 1111.]

Carriers—Injuries to Passenger—Setting Down Passenger—Defects in Street.*—Though a city is responsible for the existence of snow and ice in the street near a street railroad track, the street railroad company will be liable for injuries to a passenger received while alighting from one of its cars, where, owing to negligence in operating its car, such passenger slipped on the snow and ice, and was run over by the car.

Evidence—Conclusions of Witness—Intoxication.—Where, in an action by a passenger against a carrier for injuries, defendant has introduced evidence that plaintiff had taken one or more drinks during the evening of the accident, it was not error to permit plaintiff to testify that he was not under the influence of liquor at the time of the injury, and defendant's contention that plaintiff's testimony should have been confined to the quantity of liquor drank was not well taken.

Trial—Instructions—Requests—Instructions Already Given.—A party cannot complain of the refusal of the court to give a requested instruction where the subject-matter of such instruction is included in the charge as given.

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; Ben M. Smith, Judge.

Action by Joseph P. Ward against the Chicago City Railway

*See extensive note, 1 R. R. R. 904, 24 Am. & Eng. R. Cas., N. S., 904; foot-note of Brooks v. Philadelphia & R. Ry. Co. (Pa.), 27 R. R. R. 683, 50 Am. & Eng. R. Cas., N. S., 683; foot-note of Hanlon v. Central R. Co. (N. Y.), 22 R. R. R. 813, 45 Am. & Eng. R. Cas., N. S., 813; Richmond Traction Co. v. Williams (Va.), 9 R. R. R. 754, 32 Am. & Eng. R. Cas., N. S., 754, where all the authorities preceding it in this series on the subject of the care required in discharging passengers are collected.

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Company. From a judgment of the Appellate Court, affirming a judgement for plaintiff, defendant appeals. Affirmed.

Watson J. Ferry (John R. Harrington, of counsel), for appellant.

James C. McShane, for appellee.

VICKERS, J. Joseph P. Ward brought an action against the Chicago City Railway Company to recover damages for an injury, which necessitated the amputation of his left leg below the knee. He recovered a judgment in the circuit court of Cook county for \$4,000, which judgment has been affirmed by the Appellate Court for the First District. The Chicago City Railway Company has prosecuted an appeal to this court, and insists here upon a reversal for the reasons (1) the court refused to direct the verdict; (2) the court erred in admitting certain evidence; and (3) in refusing certain instructions asked on behalf of defendant below. The declaration consists of three counts. In the first count it is charged that appellant recklessly and negligently started its car suddenly forward without warning to the appellee, by means whereof appellee was thrown from the car to the ground and under the wheels of said car. The second count charges that appellant had negligently permitted snow and ice to accumulate and remain near its track, so that appellee, in attempting with due care to alight from the car, slipped upon the frozen ice and snow under the car, and was injured. The third count is not relied on to support the judgment and need not be noticed.

The accident in question occurred about 10:30 on the night of the 18th of February, 1905, at Thirty-First and La Salle streets, in the city of Chicago. Appellee was a passenger on appellant's car going east on Thirty-First street. He stood in the body of the car near the door until the car passed Wentworth avenue. La Salle street, where he intended to get off, is the next street east of Wentworth. When the car was about midway between the two streets, he went out on the front platform, and told the motor-man he wanted to get off at La Salle street. When the car reached the west side of La Salle street, it began to slacken its speed, and, when the front end of the car was near the east sidewalk, appellee stepped down on the step, supporting himself by holding to the handrails on either side of him. He was facing ahead, intending to leave the car when it stopped. When the front end of the car was a few feet east of the east line of the sidewalk on La Salle street, the car was moving about as fast as an ordinary walk. Appellee then raised his right foot, and was in the act of stepping off the car, when the car made a sudden lurch or jerk forward, which threw appellee off the car, and his foot slipped under the car and was caught under the wheels, and crushed so that it became necessary to amputate it. The evidence shows that there had been frequent snows during the month of February, prior to the accident,

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and that the weather had been below freezing continuously from the first day of February until the night of the accident. It also appears that appellant had by the use of snowplows plowed the snow off of its tracks, and left a sloping ridge of snow and ice just south of the south rail. The ridge sloped toward the rail, and the evidence tends to show that it was practically like ice.

Appellant's contention is in support of the first assignment of error that there is no evidence tending to prove that the sudden starting of the car which caused appellee to fall was the result of any negligent act of appellant. Appellee testifies that it was the sudden jerk of the car that threw him off. Besdick, a witness for appellee, testifies that he was on the car at the time of the accident, and that the car slowed down at La Salle street and then gave a jerk as if to go on forward. Felix Harrison testifies that he was on the northwest corner, on the night of the accident, of La Salle street and Thirty-First street; that he saw the car coming up and saw it slow up to a stop and make a quick start, and immediately he heard some one holler; that he heard the hollering just as the car started up. Eddie Myers was a passenger on the car, and he testifies that after the car came near a stand-still it gave a sudden jerk. He also testifies that the motorman pulled the lever, and that it was at that time that Mr. Ward disappeared. He says also that appellee was on the steps when the lever was thrown. This evidence warranted the court in submitting the case to the jury under the first count. There was no error in denying appellant's motion for a directed verdict.

Appellant next contends that the court erred in permitting appellee, over its objection, to testify that he was not at the time of the accident in any degree under the influence of liquor. Evidence had been introduced showing that appellee had taken one or more drinks during the evening of the accident. The purpose of this evidence was presumably to show that appellee was intoxicated. Appellant contends that it was only proper for appellee to state the quantity of liquor drank, and let the jury determine whether he was drunk or sober. We think this is not the only evidence receivable on the question of intoxication. We think it was competent for appellee to testify that he was not under the influence of intoxicating liquors at the time of the accident. 17 Cyc. 135; *Dimick v. Downs*, 82 Ill. 570.

It is next insisted by appellant that the court erred in refusing to give instruction No. 41 asked on behalf of appellant. That instruction told the jury that appellee, under the circumstances stated in the instruction, assumed the risk of injury from the condition of the street. There was no error in refusing this instruction, since all that appellant was entitled to on that subject was embodied in instructions Nos. 13 and 14, which were given at its request by the court. Instruction 13, which was given told the jury that the plaintiff could not recover on the ground solely

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and only of the condition of the street, with respect to snow and ice, at the time and place in question. The court was not required to repeat the same matter that was stated in instructions given. The court did not commit any reversible error in refusing the other two instructions complained of.

No other reasons are urged why this judgment should be reversed. It is accordingly affirmed.

Judgment affirmed.

FAIRFIELD v. LOUISVILLE & N. R. CO.

(Supreme Court of Mississippi, Feb. 22, 1909).*

[48 So. Rep. 513.]

Trial—Instructions—Applicability to Pleadings and Proof.—In an action against a carrier for refusing to admit a passenger to a train, it was error to instruct that she could not recover without showing that the coupon book presented for passage contained coupons which had not been detached, where neither pleadings nor proof raised that issue; defendant having pleaded that admission was denied because the train was already filled.

Carriers—Passengers—Detached Tickets—"Void if Detached."—A condition, "Void if detached," etc., in railway coupon tickets, must be reasonably construed to avoid injustice to either party, and the holder cannot be denied passage merely because the ticket had been inadvertently detached, if both book and ticket are presented, and it can be seen by inspection that they correspond.

Appeal and Error—Harmless Error—Instructions.—Error in instructing on the measure of damages is not ground for reversal, where the jury finds that no liability existed.

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

Action by Mrs. George W. Fairfield against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

This is a suit by Mrs. Fairfield against the defendant railroad company for damages alleged to have been caused by the action of the gateman of said company at New Orleans, who refused plaintiff and her husband admission through the gates to the train which they desired to take for their home in Pass Christian, Miss. Plaintiff had spent the day in New Orleans under medical treatment, and because of the delay she had to take a later train, which was very much crowded, and she was forced to stand up all the way home, and was thereafter made sick through fatigue and nervousness. The case was submitted to the jury under instructions of the court, and a verdict returned for the defendant. On

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appeal the giving of instructions Nos. 15 and 16, which informed the jury that she could not recover unless, at the time her ticket was presented to the gateman, it was shown not to have been detached from the book. They further assign as error the granting of instructions Nos. 9 and 11, given for defendant, as follows:

"No. 9. The court charges the jury that there is no evidence in this case which would justify the jury in finding that the plaintiff's sickness, after the night of February 12th, was due to the matter complained of in this case."

"No. 11. The court charges the jury that if the gatekeeper explained to the plaintiff that she could not pass through the gate, and she nevertheless insisted upon doing so, and remained at the gate, and continued to present her ticket a number of times, and repeated her demand for entrance several times after the gatekeeper explained to her that he could not let her through, and if she continued nevertheless to stand in the way of other passengers, to interrupt the business of the defendant, by crowding the gate, then the gatekeeper had the right to call an officer to compel her to leave the gate, and she would not be entitled to any damages for injuries suffered by reason of his doing so."

Rucks Yerger and Barrett & Taylor, for appellant.

Gregory L. Smith and Harry T. Smith, for appellee.

FLETCHER, J. The testimony of plaintiff and her husband, if believed by the jury, tended to show such treatment by the servants of the railroad company as would warrant recovery. To meet this proof, the company offered nothing of an affirmative or positive character. None of the witnesses for the railroad remembered anything of the circumstances of the occurrence. In this state of the proof, the verdict of the jury is little short of remarkable. But the cause of this verdict can be understood when the instructions asked and secured by the railroad company are attentively examined. Mr. Fairfield testified that he bought at Pass Christian a coupon book containing ten tickets to New Orleans, good on any train operated over defendant's line. He and his wife used two of the tickets in going to New Orleans, and when ready to return presented the book, with only two tickets missing, to the gatekeeper, and were refused admission. This book containing the tickets was examined by the ticket agent at New Orleans and pronounced good for the train upon which plaintiff sought to take passage. The tickets contained the usual stipulation that they were void if detached from the book; but there is no hint in the pleadings that the company would rely as a defense upon the point that the tickets were so detached. Indeed, the defendant company pleaded that the seats were all sold and occupied at the time plaintiff applied for admission at the gate, and therefore admission was properly refused. There was no suggestion in the proof that the tickets were not fastened to the

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book when presented, and no complaint by either the gatekeeper or the agent on this ground; and yet in this state of the record the jury was charged in instructions Nos. 15 and 16 that the plaintiff could not recover unless she had shown by the evidence that the book contained coupons which had not been detached, and, again, that she could not recover unless she showed that at the time she demanded entrance she presented to the gatekeeper the book which at the time contained coupons which had not been detached from the fastening by which they were held in the book at the time that it was sold to her husband.

These instructions, even if abstractly and in a proper case correct, have no place in the case made by this record. Their only effect was, after the case had closed, to inject a false issue before the jury, not suggested by the pleadings or the proof. Indeed, these instructions are equivalent to a peremptory charge, since the plaintiff, misled by the pleadings, had offered no proof upon an issue which nobody suspected would be important. Then, too, the instructions are not correct, considered as an abstract proposition of law. It is not true that the holder of such a ticket is to be denied passage merely because the ticket has inadvertently been detached, if both book and ticket are presented, and it can be seen by inspection that they correspond. The condition, "Void if detached," etc., must be sensibly and reasonably construed, to the end that no injustice may be done to either party to the contract. What we consider the only just and tenable view on this question is thus expressed by the Wisconsin court: "The words, 'Not good for passage if detached,' would seem to have been so placed upon the ticket to prevent imposition by the separation of the parts and the use of each as a single-trip ticket; but where such parts of the tickets become separated by such inadvertence, and are then in good faith both presented together and at the same time to the same conductor on the going trip, the purpose of such words would seem to be as fully attained as though the two parts of the ticket had not been previously separated. In other words, the presentation to the conductor of the two parts of the ticket, under the circumstances found, is the same, in legal effect, as though such parts had not been detached when so presented. It is to be remembered that the ticket was the mere evidence of the contract of carriage, and that such evidence consisted of two parts designed for separation. To imply such forfeiture of the contract from such mere inadvertent separation, under the circumstances found, when no word, letter, or figure on either part of the ticket was thereby obliterated, and when no perceivable injury to the defendant could result therefrom, would be to destroy a statutory right upon the merest technicality, and in the absence of a clearly expressed stipulation to that effect. Even a strict literalism is not to be so rigidly enforced as to defeat the

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manifest purpose of a contract under a statute. Whether a different rule should prevail where the passenger willfully, and against the protest of the conductor, separates the coupons or parts of a ticket, as in some of the cases cited, need not be here considered." *Wightmen v. Chicago & Northwestern R. Co.*, 73 Wis. 169, 40 N. W. 689, 2 L. R. A. 185, 9 Am. St. Rep. 778.

We desire to say that in our judgment instructions Nos. O and 11 ought not to have been given; but, since they relate alone to the measure of damages, we would not reverse on this account, since the jury has found that no liability at all existed. They should not, however, be given on another trial.

Reversed and remanded.

BLACK v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, April 22, 1909.)

[64 S. E. Rep. 418.]

Damages—Mental Suffering.*—The common law in force in this state does not allow recovery for mental suffering in the absence of bodily injury.

Carriers—Performance of Contract of Transportation—Action for Breach—Damages—Mental Suffering.*—Where plaintiff, a passenger, was merely required to transfer at Y. from a train of defendant railroad not scheduled to stop at P., the station for which she bought a ticket, was delayed only 1 hour and 13 minutes in reaching P., and was not delayed in reaching her ultimate destination, and it appeared that the waiting room accommodations at Y. were superior to those at P., and that plaintiff suffered no bodily injury, and was not subjected to any discourtesy, and there was no evidence of wanton or willful misconduct on the part of defendant railroad's servants, plaintiff was not entitled to recover for mental suffering.

Carriers—Passenger's Effects—Delay in Delivery—Damages—Punitive Damages.†—Where defendant railroad made an earnest effort to

*For the authorities in this series on the right to recover for mental suffering in negligence cases, see first foot-note of *Southern Pac. Co. v. Hitzer* (C. C. A.), 17 R. R. R. 724, 40 Am. & Eng. R. Cas., N. S., 724, where all those preceding it are collected; second foot-note of *Taber v. Seaboard A. L. Ry.* (S. Car.), 31 R. R. R. 60, 54 Am. & Eng. R. Cas., N. S., 60; foot-note of *Morris v. St. Paul City Ry. Co.* (Minn.), 30 R. R. R. 438, 53 Am. & Eng. R. Cas., N. S., 438; foot-note of *Gulf, etc., Ry. Co. v. Overton* (Tex.), 30 R. R. R. 302, 53 Am. & Eng. R. Cas., N. S., 302; foot-note of *Kyles v. Southern Ry. Co.* (N. Car.), 29 R. R. R. 336, 52 Am. & Eng. R. Cas., N. S., 336.

†For the authorities in this series on the subject of the right to recover punitive or exemplary damages for wrongs to passengers, see second foot-note of *Southern Ry. Co. v. Brewer* (Ky.), 29 R. R. R. 632, 52 Am. & Eng. R. Cas., N. S., 632; first foot-note of *Taber v.*

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trace and deliver plaintiff's baggage which had miscarried, an inference of willful misconduct was not warranted, and plaintiff could not recover punitive damages for the delay in delivery.

Carriers—Performance of Contract of Transportation—Stopping at Destination—Duty of Passenger to Inquire.‡—A railroad company may adopt a rule that a certain train shall not stop at designated stations, and a passenger is bound to inquire whether the train on which he takes passage stops at his destination.

Trial—Assumptions by Judge as to Facts.—Where, in an action against a railroad for damages to plaintiff's baggage, plaintiff raised no issue as to the identity of the ticket issued to her as a passenger, and it was identified by the agent who issued it, and by the conductor who punched it, and was introduced in evidence without objection, the court had a right to assume that it was the ticket issued to plaintiff.

Carriers—Passenger's Baggage—Injury—Action—Question for Jury—Construction of Ticket.—Where the complaint, in an action against a railroad for damages to plaintiff's baggage, alleged that defendant issued to plaintiff a ticket authorizing her to ride on its trains, as a part of her cause of action, and the ticket was introduced in evidence without objection, and its identity was not disputed, it was the province of the court to construe its terms as a matter of law responsive to the testimony, even if strict pleading required defendant to plead a limitation of liability stated in the ticket.

Carriers—Contracts Limiting Liability.§—While a carrier cannot by contract exempt itself from liability for its own negligence, the carrier

Seaboard Air Line Ry. (S. Car.), 31 R. R. R. 60, 54 Am. & Eng. R. Cas., N. S., 60; Illinois Cent. R. Co. v. Gortikov (Miss.), 28 R. R. R. 650, 51 Am. & Eng. R. Cas., N. S., 650; last foot-note of Southern Ry. Co. v. Lee (Ky.), 26 R. R. R. 285, 49 Am. & Eng. R. Cas., N. S., 285.

‡For the authorities in this series on the subject of the validity of a carrier of passenger's rules and regulations, see first foot-note of Funderburg v. Augusta & A. Ry. Co. (S. Car.), 30 R. R. R. 281, 53 Am. & Eng. R. Cas., N. S., 281; sixth head-note of Birmingham, etc., Co. v. Yielding (Ala.), 30 R. R. R. 285, 53 Am. & Eng. R. Cas., N. S., 285; first foot-note of Olson v. Northern Pac. Ry. Co. (Wash.), 29 R. R. R. 705, 52 Am. & Eng. R. Cas., N. S., 705; Birmingham, etc., Co. v. Stallings (Ala.), 29 R. R. R. 319, 52 Am. & Eng. R. Cas., N. S., 319.

As to the duty of passengers to inform themselves in regard to the movements of trains, see second foot-note of Robertson v. Louisville & N. R. Co. (Ala.), 18 R. R. R. 61, 41 Am. & Eng. R. Cas., N. S., 61.

§For the authorities in this series on the subject of the power of a railroad to limit its liability with respect to its passenger's baggage, see second foot-note of French v. Merchant's & Miners' Transp. Co. (Mass.), 30 R. R. R. 608, 53 Am. & Eng. R. Cas., N. S., 608.

For the authorities in this series on the subject of the right of a common carrier of freight to exempt itself from liability for its own negligence or that of its employees, see first foot-note of Southern Express Co. v. Gibbs (Ala.), 30 R. R. R. 271, 53 Am. & Eng. R. Cas., N. S., 271; second foot-note of Siemonsma v. Chicago, etc., Ry. Co.

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and shipper may make a special contract upon consideration, agreeing on a valuation of property shipped in case of loss or damage.

Carriers—Passenger's Effects—Loss or Damage—Contracts Limiting Liability.—A passenger, not assenting to or receiving any consideration for a contract limiting the carrier's liability for baggage, is not bound thereby, even though the limitation be reasonable.

Appeal and Error—Harmless Error—Error Cured by Verdict.—In an action against a railroad for damages to plaintiff's baggage, error in holding plaintiff bound by a contract limiting defendant's liability, to which plaintiff did not assent, and for which she received no consideration, provided the jury believed the limitation reasonable, was harmless; the verdict in plaintiff's favor showing that the jury did not deem the limitation reasonable, and were not governed by it.

Appeal from Common Pleas Circuit Court of Colleton County; Geo. W. Gage, Judge.

Action by Mamie Black against the Atlantic Coast Line Railroad Company. Judgment for plaintiff for less than amount claimed, and she appeals. Affirmed.

J. G. Padgett and Howell & Gruber, for appellant.

W. Huger Fitzsimons and Peunfoy Bros., for respondent.

JONES, J. On December 6, 1905, at Jacksonville, Fla., plaintiff became a passenger on defendant's fast train No. 82, with a full fare ticket from Jacksonville to Green Pond, S. C., and with check to her trunk to that point issued by defendant. The trunk never reached Green Pond, and when finally traced, it was found in defendant's depot at Hague, Fla., and was delivered to plaintiff March 4, 1906, with the contents badly damaged. When the train left Savannah, the conductor informed plaintiff that train No. 82 would not stop at Green Pond, and that she would have to get off at Yemassee and there await the local train No. 42 from Augusta to Charleston. Plaintiff demurred to this, and told the conductor that she wanted to go on to Green Pond by that train. On reaching Yemassee the porter came in and picked up her grip, and told her that was the place

(Iowa), 28 R. R. R. 140, 51 Am. & Eng. R. Cas., N. S., 140, where all those preceding it are collected.

For the authorities in this series on the subject of the right of a common carrier to limit the amount of its liability for loss of or damage to freight, see foot-note of *Southern Express Co. v. Gibbs* (Ala.), 30 R. R. R. 271, 53 Am. & Eng. R. Cas., N. S., 271; second foot-note of *Central of Georgia Ry. Co. (Ga.)*, 9 R. R. R. 292, 32 Am. & Eng. R. Cas., N. S., 292, where all those preceding it are collected; first foot-note of *Jones-Lane Co. v. Atlantic Coast Line R. Co. (N. Car.)*, 31 R. R. R. 46, 54 Am. & Eng. R. Cas., N. S., 46.

||See first foot-note of *Chicago, etc., Ry. Co. v. Cotton* (Ark.), 31 R. R. R. 18, 54 Am. & Eng. R. Cas., N. S., 18; *Lake Erie & W. R. Co. v. Holland* (Ind.), 9 R. R. R. 735, 32 Am. & Eng. R. Cas., N. S., 735, where all those preceding it are collected.

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for her to get off, and walked out, and the plaintiff followed and got off the train. She remained at Yemassee about 73 minutes, and boarded the local train, and was carried to Green Pond on the original ticket, reaching Green Pond in time to take the train to Walterboro, her final destination. No. 82 was not scheduled to stop at Green Pond, but occasionally had done so for some reason of emergency, as for water, to let off a sick passenger, to pass another train, or when it was behind local train No. 42. Plaintiff brought this action in January, 1906, to recover \$5,000 as damages for alleged negligent and willful breach of duty in failing to carry plaintiff and her baggage to Green Pond, alleging that she was subjected to anxiety and humiliation in being required to leave the train at Yemassee, and remain there for some time, and that the defendant's agent at Jacksonville informed her when she bought her ticket that her train would stop at Green Pond. The value of the trunk and contents was alleged to be \$500, and at the time of the commencement of the action the trunk had not been found and delivered. Plaintiff found in the trunk her money, about \$30, and her gold watch, but testified that the clothing was so damaged as to be practically worthless, and estimated her loss at \$900 or \$1,000. When the trunk was delivered, the defendant's agent at Hague, in presence of plaintiff and her father, made a list of the articles in the trunk, estimating their value, exclusive of money and watch, at \$304.80. About one dozen oranges were also in the trunk, and had become rotten, and this probably contributed to damage the clothing. The jury rendered a verdict in favor of plaintiff for \$300. Plaintiff moved for a new trial for alleged error in the charge to the jury, but the motion was refused, and plaintiff now appeals from the order refusing a new trial, and from the judgment upon exceptions to the charge.

1. It is contended that the court erred in charging the jury that plaintiff, having received no physical injury, and none having been alleged in the complaint, could recover no damages for worry and mental anguish caused by the alleged delay. The exception does not specify wherein there was error. The charge was in accordance with the common law enforced in this state, which does not allow recovery for mental suffering in the absence of bodily injury. *Mack v. R. R. Co.*, 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913; *Lewis v. Tel. Co.*, 57 S. C. 330, 35 S. E. 556; *Taylor v. R. R. Co.*, 78 S. C. 559, 59 S. E. 641. It is argued that this rule does not apply when the carrier's breach of duty was willful, as alleged in this case. There was not a scintilla of evidence of any reckless, wanton, or willful misconduct on the part of defendant's servants in the treatment of plaintiff as passenger. At most plaintiff was subjected to a mere transfer, from a train not scheduled to stop at her station, to one scheduled to stop there, done without any

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rudeness, and with the least possible inconvenience to plaintiff, involving a delay in reaching Green Pond of only 1 hour and 13 minutes, and no delay whatever in her connection for Walterboro, her destination. She would have had the same wait at Green Pond as she had at Yemassee, and the waiting room accommodations at Yemassee were superior to those at Green Pond. But, if it be conceded that there was evidence of willfulness, the court covered that aspect fully in the general charge. In the particular charge complained of the court was instructing the jury as to whether they could give compensatory damages for wounded feelings in the absence of bodily injury.

2. The court charged that, defendant having made reasonable effort to trace and deliver the trunk, no punitive damages could be recovered on that account, but only such actual damages, from injury to its contents and inconvenience from delay, as plaintiff sustained could be recovered. We think there was no error in withdrawing from the jury the question of punitive damages with respect to the trunk. On the morning of December 6, 1905, plaintiff and her husband traveled on the Seaboard Air Line from Highland to Jacksonville, and, while on board train, received baggage check No. 7,063 of that company for the trunk. On reaching Jacksonville plaintiff's husband, through a negro employee of the Union Station Company, procured in exchange for the Seaboard check, the Atlantic Coast Line baggage check No. 37,288. There was testimony that the baggage was never actually delivered to the defendant company, but we assume that it was, since it issued its check therefor, and the trunk was finally found to be in its possession. But immediately upon demand of plaintiff for the baggage an earnest effort was made to trace and deliver it. When finally located at Hague, Fla., the trunk had on it the Seaboard check, and no check of the Atlantic Coast Line, and no mark to indicate its origin or destination, and this, no doubt, rendered the tracing for baggage with the Atlantic Coast Line check more difficult. While the circumstances may warrant an inference of negligence in the transfer of the baggage at Jacksonville and its transportation to Hague, there is nothing to show any reckless or wanton disregard of plaintiff's rights. The delay in locating and delivering the baggage would not warrant an inference of willfulness, in view of the undisputed evidence of effort to trace and deliver. *Roberts v. Tel. Co.*, 73 S. C. 523, 53 S. W. 985, 114 Am. St. Rep. 100; *Butler v. Tel. Co.*, 77 S. C. 148, 57 S. E. 757.

3. It is excepted that the court erred in charging the jury that a railroad company has a right to adopt a regulation that a certain train shall not stop at designated stations, and one traveling as a passenger on such road is bound to inquire whether the train upon which he takes passage stops at the place to which

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he is going; the contention being that it is not the duty of the passenger to make such inquiry. There was conflict in the testimony as to whether plaintiff made any such inquiry. The instruction given is sustained by the case of *Carter v. Railway*, 75 S. C. 360, 55 S. E. 771, in which the court said: "There can be no doubt of the right of railroad companies to run passenger trains stopping only at important stations, provided reasonably adequate provision is made by other trains for the accommodation of local travel. Incident to this right of a railroad company is the duty of a passenger, before boarding a train, to use diligence to ascertain if it stops at his destination; and, if the passenger fails to use the means of information at his command, he cannot complain of the resulting inconvenience or damage, even if on his refusal to pay the additional fare to the next regular stopping place he is ejected from the train." (*Italics added.*) The court further said: "As a general rule, where a passenger on account of the mistake of the carrier's agent boards a train not scheduled to stop at his station, the carrier has a right to correct the mistake by letting the passenger off at a stopping of that train before passing the passenger's destination, so that he may take the next train scheduled to stop at his destination; and it is the duty of the passenger to stop off and wait for such train." There were no exceptional circumstances in this case to take it out of the general rule.

4. The court instructed the jury that the ticket or contract in this case limited the value of the baggage to \$100; that a railroad company has a right to limit its liability for baggage, and if the jury believed that the sum of \$100 was a reasonable limitation, then nothing more than \$100 can be recovered for the value of the baggage. It is alleged, first, that this was a charge in respect to a matter of fact, but we think this objection cannot be sustained. The ticket in question was identified by the agent who issued it and the conductor who punched it and was introduced in evidence without objection. The plaintiff raised no issue whatever as to the identity of the ticket issued to her as passenger. Under such circumstances the court has a right to assume as an undisputed fact that the ticket in evidence was the ticket issued to plaintiff. It is next contended that such charge should not have been given, as defendant had not pleaded any limitation of liability by contract. Judge Gage hesitated to so charge because of this. The complaint having alleged that defendant issued to plaintiff a ticket authorizing her to ride upon its train, as a part of her cause of action, and the ticket having been introduced in evidence without objection, and its identity not disputed, it was the province of the court to construe the terms of the ticket as a matter of law responsive to the testimony, even if strict pleading required defendant to plead the alleged limitation of liability as stated in the ticket.

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Russell v. Arthur, 17 S. C. 480; *Harbert v. R. R. Co.*, 78 S. C. 549, 59 S. E. 644. The more serious objection to the charge is the last contention: That, plaintiff having paid full rate for the ticket, the limitation of liability with respect to baggage is not valid, even though the jury might think it reasonable. It is a well-settled rule that a common carrier cannot by contract exempt itself from liability for its negligence; but it is equally well settled that the carrier and shipper may make a special contract upon consideration, agreeing upon a valuation of property shipped in case of loss or damage. *Johnstone v. R. R. Co.*, 39 S. C. 56, 17 S. E. 512. In *Norman v. Southern Ry.*, 65 S. C. 517, 44 S. E. 83, 95 Am. St. Rep. 809, this court held that a passenger paying full fare for a general ticket is not bound by limitations printed thereon, unless his attention has been especially called to them, and he has assented thereto. As there was no conclusive evidence that plaintiff had received any consideration, in reduced charges or otherwise, for such a contract, and no conclusive evidence that she had knowledge of, and consented to, such special limitation or condition, it was error to hold the plaintiff bound by the limitation, if the jury deemed the limitation reasonable, as it is not the reasonableness of the limitation alone which binds the passenger, but it is his assent thereto upon consideration which binds or estops him. Nevertheless we do not think the error should work a reversal, as it is manifest from the verdict of \$300 in favor of plaintiff that the jury did not regard the limitation of liability reasonable, and were not governed by it. There was no basis for punitive damages, as already shown, and there was no basis for more than a mere nominal sum for the slight delay involved in the transfer of plaintiff at Yemassee, hence it is fair to assume that the jury made their verdict upon their estimate of the loss to plaintiff by the delay in delivering the trunk and the damage to its contents.

The verdict is already for the plaintiff, and we see no good reason to believe that another trial would promote substantial justice in this case.

The judgment of the circuit court is affirmed.

LOUISVILLE & N. R. Co. *et al.* v. ROTH.

(Court of Appeals of Kentucky, Dec. 3, 1908.)

[114 S. W. Rep. 264.]

Damages—Personal Injury—Amount.—Where plaintiff was knocked senseless, his body bruised and cut, his ankle badly injured, and as a result he was confined to his bed for several weeks, the general condition of his health was greatly impaired, and his capacity to labor largely reduced, a verdict of \$3,000 as compensation was not excessive.

Railroads—Duty to Protect Crossing.—Not only the company owning a railroad, but a company running over it, is responsible to a third person for failure to have a crossing in a busy part of a city protected, notwithstanding a contract between the two placing the duty on the owner.

Railroads—Crossing Accident—Gross Negligence.*—There is gross negligence authorizing punitive damages, where, through reckless inattention to duty of one stationed at a railroad crossing to operate the gates, they are left up when a train is approaching, and a team is allowed to drive in front of it; a view of it from the team being obstructed by cars on a siding.

Damages—Punitive Damages.*—Punitive damages, allowable in case of gross negligence, may be allowed for omission, as well as commission.

Corporations—Torts—Agent's Acts—Punitive Damages.*—Punitive damages may be allowed against corporations for acts of their agents.

Damages—Punitive Damages—Amount.—The amount of punitive damages is in the sound discretion of the jury, with the limitation that they must not be so excessive as to indicate influence by passion or prejudice, and must have some reasonable relation to the injury and the cause of it; so that, the actual damages found being \$3,000, and the gross negligence being in leaving up the gates at a railroad crossing, allowing a team to get in front of a train, an allowance of \$2,000 punitive damages is not excessive.

Trial—Joint Tort-Feasors—Separate Verdicts.—Where joint tort-feasors are sued in the same action, separate verdicts for different amounts may be awarded against them, and punitive damages allowed against one, and not against the other.

Railroads—Crossing Accident—Contributory Negligence—"Ordinary Care."†—One driving onto a railroad at a crossing, where the gates have negligently been left up though a train is approaching, has no

*See second foot-note of *Schulte v. Louisville & N. R. Co.* (Ky.), 29 R. R. R. 203, 52 Am. & Eng. R. Cas., N. S., 203; first foot-note of *Taber v. Seaboard A. L. Ry.* (S. Car.), 31 R. R. R. 60, 54 Am. & Eng. R. Cas., N. S., 60.

†See foot-note appended to *Union Pac. v. Rosewater* (C. C. A.), 29 R. R. R. 193, 52 Am. & Eng. R. Cas., N. S., 193; last foot-note of

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right to rely exclusively on the operatives of the gates or of the train in looking out for his safety and giving him notice, but he must use "ordinary care," such care as an ordinarily prudent person would use under the same or similar circumstances, to discover the approach of the train and for his own safety; and, if he does so rely on the others, without using such care, he is guilty of contributory negligence.

Negligence—Definition.†—Negligence is the failure to exercise ordinary care.

Negligence—"Gross Negligence."§—"Gross negligence" is the failure to exercise slight care.

Appeal from Circuit Court, Kenton County.

"To be officially reported."

Action by Phillip Roth against the Louisville & Nashville Railroad Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Galvin & Galvin, S. Rouse, and Benjamin D. Warfield, for appellants.

Robert O. Simmons, for appellee.

CARROLL, J. The appellee was injured in a collision between one of the trains of the Louisville & Nashville Railroad Company and a wagon that he was driving across the railroad tracks where they intersect Twelfth street in the city of Covington. There is little, if any, dispute about the facts as they relate to the cause of the collision. The Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company operated a railway extending into the city of Covington upon Twelfth street, over which the trains of the Louisville & Nashville Railroad Company were run. Twelfth street, at the point where it crosses the railroad tracks, is in a populous part of the city, and many vehicles using this street across the railroad tracks at this intersection. For several years prior to the accident the bridge company maintained at this crossing safety gates in charge of a watchman, who was in the employ of the bridge company. The accident occurred about 8 o'clock in the morning, as appellee was driving west on Twelfth street and attempting to cross the railroad tracks. As he approached the crossing, he was driving in a slow trot. The gates were up and open; and, supposing that he could safely cross the

Louisville & N. R. Co. v. Wilson (Ky.), 26 R. R. R. 44, 49 Am. & Eng. R. Cas., N. S., 44.

†See first foot-note of *Bandekow v. Chicago, etc., Ry. Co.* (Wis.), 31 R. R. R. 159, 54 Am. & Eng. R. Cas., N. S., 159; third foot-note of *McFeat v. Philadelphia, etc., R. Co.* (Del.), 30 R. R. R. 254, 53 Am. & Eng. R. Cas., N. S., 254; first foot-note of *Miller v. Baltimore, etc., R. Co.* (Ohio), 30 R. R. R. 221, 53 Am. & Eng. R. Cas., N. S., 221.

§See third foot-note of *Baker v. Tacoma E. Ry. Co.* (Wash.), 22 R. R. R. 723, 45 Am. & Eng. R. Cas., N. S., 723.

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tracks, he made the attempt. Just as he reached the northbound main track, a Louisville & Nashville passenger train appeared, running at a speed variously estimated from 15 to 30 miles an hour. The point of the engine struck the front part of the vehicle, separating the horses from it, throwing the horses on one side of the train, and leaving the wagon in which Roth was riding upon the other. The wagon with Roth in it, after being separated from the team, was struck by the baggage car, and by one or two other cars, causing it to be rolled over several times. Appellee was knocked senseless, his body was bruised and cut, his ankle badly injured, and as a result of the accident, he was confined to his bed for several weeks. At the time of the trial, which took place several months afterwards, the general condition of his health was greatly impaired, and his capacity to labor largely reduced. The watchman, who should have closed the gates before the train reached the crossing, thereby warning travelers of its approach and preventing them from getting on the tracks, in place of discharging his duty, was engaged in talking to a colored woman. There is sharp conflict in the evidence as to whether the engine bell was ringing. A number of witnesses testified that the train gave no warning of its approach, while others said that the engine bell was ringing. Appellee testified that he was keeping a lookout for approaching trains, but was prevented from seeing the one that struck him by a string of freight cars, on a side track near the crossing, that obstructed his view of the train. These cars also prevented the engineer from discovering appellee until his team came on the track. The jury assessed the damages against the Louisville & Nashville Railroad Company at \$1,000, and awarded \$2,000 as compensation against the bridge company, and \$2,000 as exemplary damages against the same company. The judgment entered upon this verdict we are asked to reverse because, first, the verdict is excessive, and punitive damages should not have been allowed; second, the court erred in giving and refusing instructions; third, misconduct upon the part of the attorney for the plaintiff. We have read carefully the parts of the argument of counsel for plaintiff objected to, and do not find that counsel exceeded the bounds of legitimate discussion in making the statements complained of.

In regard to the size of the verdict, if appellee had not been entitled to punitive damages, the argument that the verdict is excessive would be entitled to more weight. He was awarded as compensation \$3,000, and under the facts we are not prepared to say that this sum was too large. At the time of his injury appellee was a man about 29 years of age, strong, active, and healthy. A number of witnesses testified that after the injury his health was impaired, and his capacity to labor lessened. The trial judge, after hearing the evidence, believed that it warranted him in submitting the question of whether or not appellee was permanently

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injured to the jury as an element of the damage that he was entitled to recover if successful. That the submission upon this point was authorized by the evidence seems to have been conceded by counsel representing both of the appellant companies, as we find that both of the appellant companies included, in instructions offered by them as an element of damage to which plaintiff was entitled, the permanent reduction of his power to earn money. But, aside from this view appellee's injuries, accepted as correct by counsel and the lower court, we are satisfied from an examination of the evidence that it authorized the court to submit this question to the jury. So that, in addition to compensation for the pain and suffering that appellee underwent as the immediate consequence of the injuries received, he was entitled to compensation for any permanent injury that was the direct result of the accident, and the amount found as compensation by the jury was not excessive. It is however vigorously insisted that the court erred in giving to the jury an instruction that permitted them to award exemplary damages, and that the verdict of the jury in assessing these damages at \$2,000, was grossly excessive. Under the admitted facts of this case there can be no doubt that both of the companies were guilty of gross neglect in failing to have the crossing protected when the train that struck appellee passed. The contract between the two companies did not relieve either of them of this responsibility. Although as between them it was the duty of the bridge company to perform this service, yet as to the public it was the duty of both, and neither could escape liability for this negligence upon the ground that, by a contract between them, it was the duty of the other to maintain these gates. The duty of protecting a crossing like this cannot be delegated to one of the companies using the track, or to the owner of the track, so as to absolve the company whose trains commit an injury, or the owner of the track, from liability to the person injured. *Schulte v. L. & N. R. Co.*, 108 S. W. 941, 33 Ky. Law Rep. 31; *L. H. & St. L. R. Co. v. Illinois Central R. Co.*, 93 S. W. 4, 29 Ky. Law Rep. 265; *L. H. & St. L. R. Co. v. Keesee*, 103 S. W. 261, 31 Ky. Law Rep. 617.

The failure to protect this crossing was not due to accident, or other cause that could not well be anticipated or guarded against. It was the result of reckless inattention to duty on the part of the employee who was stationed there to warn travelers of the approach of trains by closing the gates. The crossing at the time appellee was injured was exceptionally dangerous on account of the cars on the siding that obstructed his view of the approaching train, and at the same time prevented the engineer from seeing his peril until it was too late to avoid his injury. But, if there had been no cars standing on the track, the fact that the gates were open was itself an invitation that the passage was safe. The open gates, in effect, said to the traveler: "You may safely cross the

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track, as no train is approaching that will injure you." The open gate was the same as if the employee stationed there had called or motioned to appellee to cross, and to leave the gates open under circumstances like those proven in this case was a reckless disregard of human life. *Louisville Bridge Company v. Moroney*, 106 S. W. 870, 32 Ky. Law Rep. 705; *Sigtes v. L. & N. R. Co.*, 117 Ky. 436, 78 S. W. 172; *L. & N. R. Co. v. Wilson*, 124 Ky. 836, 100 S. W. 302; *Cross v. I. C. R. Co.*, 110 S. W. 290, 33 Ky. Law Rep. 432. As the companies were guilty of gross neglect, the appellee was entitled to be allowed, in the discretion of the jury, punitive or exemplary damages. That such damages may be awarded where the negligence is gross is no longer an open question in this state. It has been so repeatedly declared as the law by this court, and is so well known to the bench and bar, that citation of authority would needlessly incumber the opinion. It is equally as well settled that such damages may, in proper states of case, be allowed for acts of omission as well as acts of commission, for the failure to perform a manifest duty, as well as for the negligent performance of an act that involves a breach of duty, and also that it is a proper element of damage in actions against corporations for the acts of their agents, as well as in actions against persons. And it is generally considered, by courts and textbook writers, that punitive damages are awarded as a civil punishment inflicted upon the wrongdoer, rather than as indemnity to the injured party, although, as he will be the beneficiary of the punishment inflicted, it might with much propriety be said that they are allowed by way of remuneration for the aggravated wrong done. *Chiles v. Drake*, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; *Milwaukee & St. P. Ry. Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374; *Lake Shore & Michigan Sou. Ry. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97; *Sutherland on Damages*, §§ 391-3; *Sedgwick on Measure of Damages*, §§ 347, 388; *Doerhoefer v. Shewmaker*, 123 Ky. 646, 97 S. W. 7.

A more difficult question is presented when it is attempted to fix the sum that in reason a jury may award. It is not practicable to say, even approximately, what amount of punitive damages a jury may assess in a case where this character of damages may be allowed. It is even more difficult of approximation and ascertainment than the correct measure of compensatory damages in personal injury cases. In the very necessity of things the amount must depend upon the facts and circumstances of each particular case. And so the amount that may be awarded as punitive damages must necessarily be left to the sound discretion of a jury, although we do not mean to hold that a jury is at liberty to award any amount it may see proper as punitive damages, or that the assessment of such damages will not be reviewed. We do not know of any general rule that can be laid down upon this point, except that the damages must not be so excessive as to indicate

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that the jury was influenced by passion or prejudice, and must have some reasonable relation to the injury and the cause of it, and not be disproportionate to the one or the other. 12 Am. & Eng. Ency. of L. 53; 13 Cyc. pp. 112, 119; Sedgwick on the Measure of Damages, § 388. Applying these general rules to this case, we find that the injury was serious, and the cause such negligence as indicated a reckless and willful disregard of human life on the part of the defendant corporation. So that it is a case calling for more than compensatory damages, and one that authorizes the infliction of exemplary damages as a punishment. And, comparing the amount assessed with the injury sustained and the gross negligence that caused it, we are not prepared to say that it is so unreasonable or disproportionate to the standards by which it must be measured as to authorize us to interfere with the finding of the jury, to whose hands was committed the amount that should in reason be awarded.

It is also argued that the jury erred in finding separate verdicts against the two defendant companies. We do not think so. Two or more wrongdoers, whose joint or concurrent acts of negligence have produced the injury complained of, may be joined as defendants in the same action; and there may be a joint or several verdict against them. The jury may find in favor of one or more, and against one or more. They may also, the law and facts justifying it, assess punitive damages against one or more and compensatory damages against others. In short, where two or more tort-feasors are sued, the question as to the amount of damages that may be assessed against each, and whether it shall be compensatory or exemplary or both, is for the jury. *Beavers v. Bowen*, 93 S. W. 649, 29 Ky. Law Rep. 526; *Alexander v. Humber*, 86 Ky. 565, 6 S. W. 453; *Central Passenger Railway Co. v. Kuhn*, 86 Ky. 578, 6 S. W. 441, 9 Am. St. Rep. 309; *Bonte v. Postel*, 109 Ky. 64, 58 S. W. 536, 51 L. R. A. 187.

The instructions of the court on the subject of contributory negligence is also complained of, but we do not think it is subject to the criticism made. On the contrary, it submitted correctly this feature of the case.

The instructions which are as follows express our views of the law of this case as it should have been and was given to the jury.

"(1) It was the duty of plaintiff, Phillip B. Roth, in approaching the railroad crossing at Twelfth and Washington streets, in the proof described, to use such care as an ordinarily prudent person would exercise under the same or similar circumstances to discover the approach of trains and to keep out of their way.

"(2) It was the duty of the defendant, the Louisville & Nashville Railroad Company, in the operation of its train at the time

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and place mentioned in the proof, to give such notice of the approach of its train to the crossing, to run its said train at such speed, to keep such lookout, and to use such care to avoid injury to persons thereon, as might usually be expected of ordinarily prudent persons operating a railroad under like circumstances.

"(3) It was the duty of defendant, the Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company, to watch said crossing, and to give reasonable and timely warning of the approach of said Louisville & Nashville train to travelers on said street about to cross at said intersection.

"(4) If the jury believe from the evidence that, as the train of defendant, the Louisville & Nashville Railroad Company, approached said crossing, in the proof described, said defendant's agents and employees in charge thereof negligently failed to give such notice of the approach of said train to said crossing, or negligently failed to run its train at such speed, or negligently failed to keep such lookout, or negligently failed to use such care, as might usually be expected of ordinarily prudent persons operating a railroad under like circumstances, in order to avoid injury to persons on or about to pass over said crossing, and that by reason of such negligent failure, if any, on the part of said defendant or its employees to so act or manage said train, the train collided with the wagon driven by plaintiff, and that by reason of such collision, and by reason of such negligent acts or omission of said defendant's employees, if any, plaintiff was injured, and if they further believe that plaintiff, when he drove on said track in front of said train, was himself in the exercise of ordinary care on his part, as hereinafter defined, the jury will find a verdict for plaintiff; otherwise, they will find a verdict for the defendant, the Louisville & Nashville Railroad Company.

"(5) If the jury believe from the evidence that the defendant, the Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company, or its employee or agent in charge of said crossing, operating the gates at same, negligently failed to give reasonable and timely warning to plaintiff of the approach of said train to said crossing, and that by reason of such negligent failure, if any there was, plaintiff, while in the exercise of ordinary care on his part, drove on said crossing, was injured by reason of the collision and said injury, if any injury there was to plaintiff, was the result of such negligent failure, if any, on the part of the defendant bridge company or its employees to give such warning to plaintiff, the jury will find a verdict for the plaintiff against the defendant, the Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company; otherwise they will find a verdict for said defendant.

"(6) If the jury find a verdict for the plaintiff, the measure

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of his damage will be a fair and reasonable equivalent in money for the physical pain, if any, and mental suffering, if any, which he has endured, and which it is reasonably certain he will in the future endure, if any, and for any permanent impairment or reduction of his power to earn money, if any as the direct and proximate result and plain consequence of the injuries sustained by him, if any; and, if the jury believe from the evidence that the negligence of the defendants, or either of them, if any there was, at the time and place referred to in the proof, was gross negligence, as hereinafter defined, then the jury may, in their discretion, governed by the proof, award plaintiff, against such defendant or defendants, a further sum by way of punitive damages or smart money, not exceeding in all, however, the sum of \$20,000, the amount claimed in the petition.

"(7) If the jury shall believe that the defendant, the Louisville & Nashville Railroad Company, was negligent in the operation of its train at the time when and the place where plaintiff was injured, and they shall also believe that the plaintiff himself was negligent in the manner in which he approached and drove upon said railroad tracks, and that the collision and subsequent injury to plaintiff would not have happened to him except for such negligence on his part, if he was negligent, then the jury shall find for the defendant, the Louisville & Nashville Railroad Company.

"(8) The court instructs the jury that the plaintiff had no right to rely exclusively upon the operatives of the gates or the railroad train in looking out for his safety and giving him notice of danger, but that the plaintiff was required to use ordinary care for his own safety; and, if he did rely exclusively upon the operatives of the gates or of the railroad train, without using ordinary care for his own safety, then he was guilty of contributory negligence, and your verdict must be for the defendants.

"(9) If the jury believe from the evidence that both of the defendants were negligent, under the instructions above given, and that such negligence, if any, of both defendants concurred in producing the injury to plaintiff, if any, and that plaintiff ought to recover damages against both defendants under the instructions herein, they may find a joint verdict against the Louisville & Nashville Railroad Company, and the Covington & Cincinnati Elevated Railroad & Transfer & Bridge Company, and they may then apportion such amount as they may so find between the defendants, and find a separate verdict against each defendant for the amount so apportioned against it; but in no event shall the recovery against both defendants exceed the sum of \$20,000, the amount claimed in the petition.

"(10) Ordinary care as used in these instructions means that degree of care ordinarily exercised by ordinarily careful and

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prudent persons in the same or similar business, or under the same or similar circumstances.

"(11) Negligence or negligently, as used in these instructions means the failure to exercise ordinary care.

"(12) Gross negligence is the failure to exercise slight care.

"(13) Nine jurors may find a verdict; but, if less than 12 unite in a verdict, all those so uniting must sign same."

The judgment of the lower court is affirmed.

CINCINNATI NORTHERN TRACTION CO. v. PITTSBURG, C., C. & ST. L. RY. CO.

SAME v. CINCINNATI, H. & D. RY. CO.

(Supreme Court of Ohio, Dec. 22, 1908.)

[86 N. E. Rep. 987.]

Railroads—Crossing Other Roads—Grade—Expense.—In a proceeding under section 3333-1, Rev. St. 1908, where a junior and senior railroad company are not able to agree as to a method of crossing, to procure an order of the court in that behalf, the court should equitably apportion between the roads only the cost of such a grade of approach as will be practicable. If the junior road desires a lesser grade, it may, with propriety, be charged with the entire additional expense of such construction.

Railroads—Crossing Other Roads—Grade—Expense.—The statute requires that not only the costs of constructing such crossing as the court may order, but also the cost of maintaining it, shall be equitably distributed between the companies.

Railroads—Crossing of Other Road—Double Track.—When, in such case, the junior road has projected and is engaged in constructing a double-track road, the cost of a crossing sufficient in width to carry a double track should be equitably apportioned between the companies.

(Syllabus by the Court.)

Error to Circuit Court, Butler County.

Applications by the Cincinnati Northern Traction Company to fix the mode by which it should construct its crossing over the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company and the Cincinnati, Hamilton & Dayton Railway Company. From an order of the court of common pleas, affirmed by the circuit court on appeal, the Cincinnati Northern Traction Company brings error. Modified.

W. C. Shepherd and *George H. Warrington*, for plaintiff in error.

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Charles Darlington and Rowe, Shuey, Matthews & James, for defendant in error Pittsburg, C., C. & St. L. Ry. Co.

Shotts & Millikin, for defendant in error Cincinnati, H. & D. Ry. Co.

PER CURIAM. These were applications made under section 3333-1, Rev. St. 1908, asking the court of common pleas to fix the mode and manner by which a junior railroad company should construct its way at a crossing of the senior company; the companies not being able to agree. The cases, having been decided in the court of common pleas, were appealed to the circuit court, where a final order was made fixing the mode and manner of crossing and apportioning certain of the costs and expenses thereof. In general, the view taken of the subject in the circuit court was entirely consistent with the view of the subject taken by this court in the case of *Toledo Ry. & Terminal Co. v. Lima & Toledo Traction Co.*, 86 N. E. 515. The present cases, however, present three questions that were not disposed of in that case.

First. The circuit court found in the present case that a 3 per cent. grade for the approach to the overhead crossing, which it ordered, was practicable, and therefore it ordered that one-half of the cost of constructing the approach at a 3 per cent. grade should be paid by each company, but that, if the junior company desired a 2 per cent. grade to reach the overhead crossing, at the required height, it should pay the additional cost of construction at that grade. We perceive no reason for differing from the conclusion of the circuit court in that respect. Its finding that a 3 per cent. grade was practicable was based upon very substantial evidence, and a practicable crossing would seem to be all that was in the contemplation of the statute.

Second. While the circuit court ordered an overhead crossing to carry the cars of the junior road, and ordered that one-half of the cost of constructing such overhead crossing should be paid by each of the roads, it ordered that the cost of maintenance should be borne wholly by the junior company. In that respect the order of the circuit court is entirely inconsistent with the statute, which provides, in express terms, that both the cost of construction and the expense of maintenance shall be equitably apportioned among the parties.

Third. The court ordered that the bridge by which the junior road should carry its track over the senior road should be wide enough for a single track, and the cost thereof apportioned equally between the companies, but that, if the junior road desired a bridge wide enough for a double track, it should pay the additional cost of constructing a bridge of that width. In that respect we think the order of the circuit court is not in accordance with the spirit and purpose of the statute. It will be con-

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sistent with that spirit and purpose, and with public policy, if the number of tracks upon which both the senior and junior roads shall operate are determined by themselves as a matter of railroad operation, rather than by the courts as a matter of law. In a proceeding of this character it will be quite as clearly within the authority of the court, for the purpose of diminishing the cost of the overhead structure, to order the senior road to reduce the number of its tracks in order that the structure may thereby be shortened, as to provide that the structure should be narrower than the wants of the junior road in order that the cost of construction may in that manner be reduced. It would hardly comport with the obvious policy of the statute to require a section of single track in a double track railroad.

The judgment of the circuit court will be in all respects affirmed, except as to propositions 2 and 3 above, as to which its judgment will be modified in accordance with the views here expressed. The modified judgment will be entered in this court and remanded to the circuit court for execution.

Judgments modified.

PRICE, C. J., and SHAUCK, CREW, SUMMERS, SPEAR, and DAVIS, JJ. concur.

GULF & S. I. R. Co. et al. v. BARNES et al.

(Supreme Court of Mississippi, March 15, 1909.)

[48 So. Rep. 823.]

Railroads—Crossings—Interlocking Devices—Duty of Companies.—

Where an interlocking device was maintained by railroad companies at a crossing of their tracks, within Code 1906, § 4896, authorizing the running of trains over crossings without stopping where such devices are used, it was the companies' duty to the public to keep the device in order.

Negligence—Contributory Negligence—Imputed Negligence.*—

If defendant railroad company's negligence in failing to keep in order an interlocking device at a crossing of another company's tracks prevents it from recovering for damage caused by a collision, it does not affect the right of defendant's fireman and the widow of defend-

*See second foot-note appended to *Liabraaten v. Minneapolis, etc., Ry. Co.* (Minn.), 30 R. R. R. 178, 53 Am. & Eng. R. Cas., N. S., 178; second foot-note of *Davis v. Chicago, etc., Ry. Co.* (C. C. A.), 30 R. R. R. 183, 53 Am. & Eng. R. Cas., N. S., 183; first foot-note of *Wade v. Western Maryland R. Co.* (Pa.), 30 R. R. R. 238, 53 Am. & Eng. R. Cas., N. S., 238; second foot-note of *Paducah Traction Co. v. Sine* (Ky.), 30 R. R. R. 755, 53 Am. & Eng. R. Cas., N. S., 755; foot-note of *Louisville Ry. v. McCarthy* (Ky.), 31 R. R. R. 227, 54 Am. & Eng. R. Cas., N. S., 226; foot-note of *Chadbourne v. Springfield St. Ry. Co.* (Mass.), 31 R. R. R. 202, 54 Am. & Eng. R. Cas., N. S., 202.

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ant's engineer, who were involved in the collision, to recover from the other company.

Negligence—Contributory Negligence—Imputed Negligence.*—Negligence of defendant company in failing to keep in order an interlocking device at a crossing of another company's tracks does not affect the right of defendant's passengers to recover from the other company for their injury.

Equity—Jurisdiction—Multiplicity of Suits—Actions for Injury.—Complainant and defendant railway companies' trains having collided at a crossing, defendant sued complainant for its damage; and defendant's engineer's widow sued the companies jointly and separately. The fireman sued complainant, and two of defendant's passengers sued both companies. Held, that a bill does not lie to compel an adjudication of the claims in one suit, to avoid a multiplicity of suits, since the same law and facts do not apply to all the claims.

Equity—Jurisdiction—Multiplicity of Suits.—Equity jurisdiction to avoid a multiplicity of suits is not exercised merely to avoid many suits; it being necessary that the suits be governed by the same principles of law and practically the same facts.

Equity—Jurisdiction—Multiplicity of Suits—Pleading.—A bill to avoid a multiplicity of suits should show that complainant has a good cause of action, whether by way of claim or defense, legal or equitable.

Appeal from Chancery Court, Forrest County; T. A. Wood, Chancellor.

Bill by the Gulf & Ship Island Railroad Company against Mrs. Virginia M. Barnes and others; the Mobile, Jackson & Kansas City Railroad Company filing a cross-bill. From the decree, complainant and cross-complainant appeal. Affirmed.

Jas. H. Neville, R. L. Dent, N. C. Hill, and Flowers & Whitfield, for appellants.

Sullivan & Tally and Campbell & Campbell, for appellees.

WHITFIELD, C. J. The case made by this record is as follows: The original bill was filed by the Gulf & Ship Island Railroad Company on the 15th day of June, 1908; the fiat for the injunction having been issued by Circuit Judge W. H. Hardy on the 13th day of June, 1908, and the bill invoking the exercise of the equitable jurisdiction of the chancery court in prevention of a multiplicity of suits. To this original bill Virginia M. Barnes and John Goldsby were made respondents. Virginia M. Barnes had sued the Gulf & Ship Island Railroad Company separately at law, and had also brought a suit against the Gulf & Ship Island Railroad Company and the Mobile, Jackson & Kansas City Railroad Company at law, for damages for the death of her husband, the engineer on the Mobile, Jackson & Kansas City Railroad Company engine at the time of the collision. The

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Gulf & Ship Island Railroad Company pleaded, as one of its defenses to her suit, the contributory negligence of her said husband, Barnes, the engineer. Goldsby sued for damages for personal injury. On the 16th day of June, 1908, the Gulf & Ship Island Railroad Company filed its amended bill against the same two defendants, Virginia M. Barnes and John Goldsby, and also against certain new parties, Mrs. Maggie Gilbert and the Mobile, Jackson & Kansas City Railroad Company, as two additional defendants. The allegation in this amended bill was that Mrs. Gilbert had sued the Gulf & Ship Island Railroad Company for damages growing out of the same collision, and that the Mobile, Jackson & Kansas City Railroad Company was threatening to sue the Gulf & Ship Island Railroad Company for damages to its locomotive and cars injured in the same collision. On the 20th day of October, 1908, the Gulf & Ship Island Railroad Company filed its supplemental bill against Virginia M. Barnes and John Goldsby, defendants to the original bill, and Mrs. Maggie Gilbert, defendant to its amended bill, and also made the Mobile, Jackson & Kansas City Railroad Company a defendant. This supplemental bill alleged, amongst other things, that the Mobile, Jackson & Kansas City Railroad Company was threatening to sue the Gulf & Ship Island Railroad Company for damages amounting to \$1,400, growing out of the collision, said damages being due to injury to its locomotives, etc., and further alleged that Virginia M. Barnes had instituted another suit in the circuit court of Forrest county against it, the Gulf & Ship Island Railroad Company, joining with it as a defendant the Mobile, Jackson & Kansas City Railroad Company. The said suit was based on the same cause of action as her original suit. The prayer of this supplemental bill was that Virginia M. Barnes be restrained from prosecuting this last suit against the two railroads, and that all the defendants to the supplemental bill be required to propound their cases to the chancery court, and that all the cases be consolidated into one case, and tried and determined by the chancery court in one suit, for the purpose of avoiding a multiplicity of suits.

On the 10th day of October, 1908, the Mobile, Jackson & Kansas City Railroad Company presented its cross-bill to Judge W. H. Hardy, praying for and obtaining the issuance of a writ of injunction, requiring all these parties, the Gulf & Ship Island Railroad Company, Virginia M. Barnes, and Maggie Gilbert, to come into the chancery court and have all these claims settled there. This answer and cross-bill of the Mobile, Jackson & Kansas City Railroad Company prayed also that the Gulf & Ship Island Railroad Company be adjudged liable to the Mobile, Jackson & Kansas City Railroad Company for \$2,000 damages to its engine and cars, growing out of the same collision; and it was alleged in said answer and cross-bill that, since the

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filing of original bill by the Gulf & Ship Island Railroad Company, Virginia M. Barnes had sued the Mobile, Jackson & Kansas City Railroad Company, separately and also jointly with the Gulf & Ship Island Railroad Company, for damages growing out of the same collision, and that Maggie Gilbert had instituted suit against the Mobile, Jackson & Kansas City Railroad Company in the circuit court of Greene county, growing out of the same collision. The injunction issued on this answer and cross-bill restrained Virginia M. Barnes from prosecuting her suit against the Mobile, Jackson & Kansas City Railroad Company, and also her suit against the Mobile, Jackson & Kansas City Railroad Company and the Gulf & Ship Island Railroad Company jointly. On December 2, 1908, the Gulf & Ship Island Railroad Company presented a second supplemental bill against Virginia M. Barnes, John Goldsby, Maggie Gilbert, the Mobile, Jackson & Kansas City Railroad Company, and one L. W. Youmans, to Judge W. H. Hardy, and obtained another injunction against L. W. Youmans, to restrain him from prosecuting a suit he had brought in the circuit court of Jones county against the Gulf & Ship Island Railroad Company and the Mobile, Jackson & Kansas City Railroad Company jointly for injuries sustained by him in the same collision, while a passenger on the Mobile, Jackson & Kansas City Railroad Company's train.

Some comment is made by the learned counsel for the appellee to the effect that Mrs. Gilbert was never made a party, and to the effect that certain of the writs were not served on all the parties against whom they were prayed to be issued, and that none of the defendants appeared at said proceedings, except Virginia M. Barnes and John Goldsby, who filed demurrers and motions to dissolve injunctions against them, and the Mobile, Jackson & Kansas City Railroad Company, which filed its answer and cross-bill as hereinbefore stated. To this it is replied by the learned counsel for appellants that none of these points were made in the court below, and that the object of the attorneys for all the parties to these various proceedings is to have this court determine, once for all, whether the equitable jurisdiction to avoid multiplicity of suits can be invoked on the case thus shown by the record. We shall therefore deal with the case generally, without reference to these minor objections.

The collision in question occurred on July 12, 1907, at an intersection of the Mobile, Jackson & Kansas City Railroad and the Gulf & Ship Island Railroad near the city of Hattiesburg. It will be noted, as a peculiar feature of the litigation, that the two railroads in question in some respects seem to be making common cause against all the plaintiffs suing them, whether separately or jointly. As an example, the attitude of the Mobile, Jackson & Kansas City Railroad Company is that by its cross-bill it not only seeks to recover \$2,000 from the Gulf &

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Ship Island Railroad Company for damages to its locomotive and cars, but at the same time enjoins Mrs. Barnes and Maggie Gilbert from prosecuting their suits against it; and so the Gulf & Ship Island Railroad Company also seeks to enjoin Mrs. Barnes and John Goldsby from prosecuting their suits against it—one for the death of her husband, and one for a personal injury—while at the same time it is contesting with the Mobile, Jackson & Kansas City Railroad Company the question of its liability to that company for alleged damages done to the locomotive and cars of the Mobile, Jackson & Kansas City Railroad Company. In other words, these two railroad companies occupy the attitude of seeking to contest with each other in a court of chancery the question of damages to the locomotive and cars of the Mobile, Jackson & Kansas City Railroad Company, and at the same time both said railroads by means of injunctions are seeking to enjoin all the plaintiffs, in all their suits at law, from prosecuting their suits at law. It appears, from the declarations, that Mrs. Barnes sued for the death of her husband, who was the engineer of the Mobile, Jackson & Kansas City Railroad at the time of the collision. John Goldsby sues for damages sustained from an injury to his leg; he being a fireman on the same locomotive of the Mobile, Jackson & Kansas City Railroad Company, operated by Mr. Barnes as engineer. Maggie Gilbert and Youmans were both passengers on the same train of the Mobile, Jackson & Kansas City Railroad Company, and were hurt in the collision, and sue for damages. The Mobile, Jackson & Kansas City Railroad Company claims damages for injury to its cars and locomotive, and sues the Gulf & Ship Island Railroad Company for such damages. One of the defenses set up against Mrs. Barnes is the contributory negligence of her husband. Again, section 4896 of the Code of 1906 provides as follows: "Where the main track of two or more railroads shall cross at grade, and the companies owning and operating them shall establish at the crossing an interlocking, derail or other safety device, the commission, if satisfied that it is sufficient to protect persons and property from danger at the crossing, may authorize the railroad companies to run their trains over it without stopping at a rate of speed to be fixed by the commission, and in such event the companies shall not be liable to any penalty for failing to stop their trains before running them over the crossing." "Where interlocking or other safety device is used, trains need not stop before crossing." Laws 1896, p. 75, c. 61.

The declarations of Mrs. Barnes and John Goldsby charge that these roads did cross at grade, and that the interlocking device had been established, and that at the time of the collision, and for some time prior thereto, it was not in working order, and was spiked down, but that this fact was not known to Engineer

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Barnes. They further charged that the Mobile, Jackson & Kansas City Railroad Company had obtained the consent of the railroad commission to run over the crossing without stopping, which fact was known to Engineer Barnes, and that on this account he was accustomed to run over the said crossing without stopping, but that the Gulf & Ship Island Railroad Company did not have such permission. Now, it is perfectly obvious that it was the duty of both these railroads to keep this interlocking device in order, so far as the public were concerned, and that both were negligent as regards the public in not doing so. If the negligence of the Mobile, Jackson & Arkansas City Railroad Company in this particular would prevent its recovery from the other railroad for damages to its locomotive and cars, such negligence, nevertheless, would in no way affect the right of Mrs. Barnes and John Goldsby to recover from the Gulf & Ship Island Railroad Company, nor the right of Mrs. Gilbert and Youmans.

Again, if, under section 1985, Code of 1906, the proof should show that the death of Barnes, and the injuries to Mrs. Gilbert, to Goldsby, to Youmans, and to the locomotive and cars of the Mobile, Jackson & Kansas City Railroad Company, were all caused by the running of the locomotive of the Gulf & Ship Island Railroad Company, then manifestly there would arise *prima facie* cases for all these parties against that company; and that company, the Gulf & Ship Island Railroad Company, might overcome this presumption by proof that its locomotive was operated in the manner required by law, and not negligently. Suppose, however, the proof should show that the locomotive of the Gulf & Ship Island Railroad Company was negligently operated, and that this negligent operation was the proximate cause of the death of Barnes, the injury of the other persons, and the damage to the locomotive and cars of the Mobile, Jackson & Kansas City Railroad Company; then the Gulf & Ship Island Company would be liable for all the parties and damages, unless it could show contributory negligence on the part of the servants of the Mobile, Jackson & Kansas City Railroad Company, in charge of that company's locomotive, in which case the Gulf & Ship Island Railroad Company would not be liable to Mrs. Barnes for the death of her husband, nor to the Mobile, Jackson & Kansas City Railroad Company for the damage to its locomotive and cars.

Let us take one other view of this curiously conceived bill, and let us present this feature of the case in the language of the very able brief of the learned counsel for appellee. The counsel say:

"The amended and supplemental bills of the Gulf & Ship Island Railroad Company and the cross-bill of the Mobile, Jackson & Kansas City Railroad Company allege that the same law

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and facts apply to all the parties injured in the collision, yet it may be possible under the law and the testimony for both roads to escape liability for the death of the engineer Barnes; but it is utterly impossible for both roads to avoid liability to John Goldsby and the passengers, Mrs. Gilbert and Youmans, for the two locomotives collided on the crossing, thus causing the injuries, and it is inconceivable that the fireman and the passengers could be responsible for the collision, but one or the other of the railroad companies, or perhaps both, are responsible. Therefore the same law and facts do not apply to all the persons suing. If the collision was caused by the negligence of Barnes, then Mrs. Barnes cannot recover from either of the railroad companies; but the very negligence of Barnes would entitle the injured passengers and John Goldsby to recover from the Mobile, Jackson & Kansas City Railroad Company, and would prevent the Mobile, Jackson & Kansas City Railroad Company from recovering against the Gulf & Ship Island Railroad Company for damages to the locomotive and cars, for the reason that the negligence of Barnes is the negligence of the Mobile, Jackson & Kansas City Railroad Company.

"If these cases were being tried separately in the circuit court, as they should be, but for these injunctions, the following would be about the way the cases would be tried:

"(a) In the case of *Mrs. Barnes v. Gulf & Ship Island Railroad Company* the plaintiff would prove that Barnes was the engineer of the Mobile, Jackson & Kansas City Railroad Company; that he was proceeding over the crossing under the belief that the derail switch was in good order, and with the consent of the commission to pass over without stopping, and that he had a clear board; that the engineer of the Gulf & Ship Island Railroad Company was seen by witnesses to approach the crossing at high speed, and that he was signaled to stop, but ignored the signals, and the collision occurred, and Barnes was killed. The defendant would attempt to contradict this testimony, especially as to the manner in which its engineer approached the crossing, and would try to show that Barnes was guilty of contributory negligence. This defense would be met by the contention that the Gulf & Ship Island Railroad Company engine was run over the crossing in a reckless and criminally negligent manner, and that contributory negligence would not avail to avoid liability.

"(b) In *John Goldsby v. Gulf & Ship Island Railroad Company* the sole question would be the negligent operation of the switch engine of the Gulf & Ship Island Railroad Company as the proximate cause of the injury. No question of contributory negligence could arise on this trial. No evidence in regard to the derail switch and the duty to keep it in repair would be admissible.

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"(c) The cases of Mrs. Gilbert and Youmans against the Gulf & Ship Island Railroad Company would be controlled largely by the same law and evidence as the John Goldsby case, except evidence of the nature of the injuries sustained. This evidence would have to be established by different witnesses in all the cases."

The trial of the case of Mobile, Jackson & Kansas City Railroad Company *v.* Gulf & Ship Island Railroad Company would not be controlled by the same law and evidence as the other cases, or any one of them, entirely. The question of contributory negligence of the engineer of the Mobile, Jackson & Kansas City Railroad Company might be raised by the Gulf & Ship Island Railroad Company; but the further question which might arise between the railroads as to the special duty of one or the other to keep the derail switch in operation or repair, and in the event the Gulf & Ship Island Railroad Company should prove that it was the duty of the Mobile, Jackson & Kansas City Railroad Company under a special arrangement to keep the derail switch in repair, and it had neglected to do this, and this was the cause of the injury, the breach of duty of the Mobile, Jackson & Kansas City Railroad Company would prohibit recovery by it; but the other persons injured would not be bound by this arrangement, for as to them it was the duty of both roads to keep the derail switch in repair. Other questions of law and fact can arise between these railroads that the other litigants can have no interest in.

"Looking at this case from the standpoints of the suits against these railroads jointly, we see, for the reasons given above, that the same law and facts will not apply to all the persons injured. In such event the Mobile, Jackson & Kansas City Railroad Company would not be governed and controlled by any law applicable to the plaintiffs suing the roads jointly. If the suits should not be tried against the Gulf & Ship Island Railroad Company individually, nor against the two roads jointly, but should be tried against the Mobile, Jackson & Kansas City Railroad Company individually, then the Gulf & Ship Island Railroad Company is not concerned in the litigation at all, and the law and the facts would not apply alike to all the parties suing; nor would the same law and facts apply in the defense of the Mobile, Jackson & Kansas City Railroad Company, for some of the persons suing were its servants and others were its passengers."

It surely cannot be necessary to do more than thus clearly state the case made by this record, to show that equity has no sort of jurisdiction in this case; that the grounds upon which jurisdiction of equity may be successfully invoked in order to present a multiplicity of suits have no existence in this case. The true ground of this equitable jurisdiction was most admirably

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stated by Chalmers, Justice, in the opinion of this court in *Pollard v. Okolona Savings & Trust Co.*, 61 Miss. 293. And this same doctrine has been announced in *Nevitt v. Gillespie*, 1 How. (Miss.) 108, 26 Am. Dec. 696. Yet, strange to say, in the case of *Tribette v. I. C. Railroad Co.*, 70 Mass. 192, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, the directly opposite doctrine was laid down, without the slightest reference being made to either the *Nevitt-Gillespie* Case or the *Pollard-Okolona Savings & Trust Co.* Case. This court has in many cases recently most carefully re-examined this whole subject, and has re-established the doctrine announced in *Pollard v. Okolona Savings & Trust Co.*, and overruled the case of *Tribette v. I. C. Railroad Co.* These latter cases to which we refer are *Railroad v. Garrison*, 81 Miss. 257, 32 South. 996, *Crawford v. Railroad Co.*, 83 Miss. 708, 36 South. 82, 102 Am. St. Rep. 476, *Tisdale v. Fire Ins. Co.*, 84 Miss. 709, 36 South. 568, and *Whitlock v. Railroad*, 91 Miss. 779, 45 South. 861. All these cases receive the hearty indorsement of the learned counsel for both the appellant and appellee in this cause.

There is a scant suggestion in the brief of the learned counsel for appellant, that the *Whitlock* Case is authority for the exercise of this jurisdiction here; but that contention is not seriously pressed, as most manifestly it could not possibly be. That the total dissimilarity of the two cases, so far as the exercise of this jurisdiction in prevention of the multiplicity of suits is concerned, may appear at a glance, it is only necessary, having set out the facts making this case, to now set out, over against them, the facts making the *Whitlock* Case in 91 Miss. 779, 45 South. 861. What are those facts? These in brief: That *Whitlock* and 49 other negroes had sued the Yazoo & Mississippi Valley Railroad Company for damages in 49 separate actions at law. Each one of these plaintiffs claimed to have been a passenger on the very same excursion train, and that he was unreasonably delayed on that train by the negligence of the railroad company, and each demanded actual and punitive damages for the delay, and the demand of each was based upon the identical facts on which the demand of every other plaintiff was based, and the principles of law applicable to each one of these 49 suits were precisely the same. It certainly would be idle to waste further time showing the utter lack of similarity between these two cases. The *Whitlock* Case rested, like all the other cases, securely upon the basic proposition that this jurisdiction is exercisable where the principles of law are identically the same and the facts are substantially the same. Indeed, one of the learned counsel for appellees not only correctly says that the *Whitlock* Case was properly decided, but that it is perfectly manifest it is not at all analogous to the case under consideration, and further states the correct proposition that the *Whitlock* Case is supported in all

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particulars by the recent case of *Southern Steel Co. v. Hopkins*, decided by the Supreme Court of Alabama on the 13th of February, 1908, and reported in 47 South. 274, to which we especially refer. It is too plain for serious discussion that the same principles of law will not apply in all the suits here involved, and just as plain that the same facts will not determine the liability in all the various suits. It would be needless to enter into any further detailed statement to show this. What we have quoted from the very able brief of the learned counsel for appellee has already demonstrated that beyond cavil.

Before passing from this discussion of the true principle on which the equitable jurisdiction to prevent multiplicity of suits in reason rests, we must call especial attention to the masterly opinion of Chief Justice Tyson, of Alabama, in the case of *Southern Steel Co. v. Hopkins et al.*, 47 South. 274, just above referred to. In the judgment of the writer of this opinion, this is the ablest discussion of the subject he has met with in any of the Reports, and we will therefore be pardoned for a liberal quotation from that opinion. That court says, at page 276:

"The question here, then, is: What is the principle upon which equity interferes to avoid a multiplicity of suits? In determining this, it may be borne in mind that the jurisdiction is not to be invoked when the remedy at law is plain, adequate, and complete, and that no court has the right to infringe upon the wholesome doctrine of multifariousness which prevents a mingling in one suit of entirely distinct and separate causes of action between different parties. Subject to these restrictions, the principle and rule is that where numerous parties are jointly and severally claiming against one, or where one is claiming against many liable or severally, and the same title or right of defense will be called in question, and will be determinative of the issue for or against all, a case for the interposition of equity to avoid a multiplicity of suits is made, without the aid of any independent equity. The fact that this unity of claim or defense frequently or generally arises from privity or joint action by or between the many affords an obvious instance of the application of the rule, and it has induced some to suppose that the junction and unity of interest calling for the application of the rule is limited to such cases. But the association and unity of interest in the many as to the other party may be brought about just as well by the nature of the transaction, or the situation and relation of the parties, independent of all privity or joint action. And therefore privity, or joint right or liability, although good examples for the application of the principle, afford no test for the propriety of its application.

"The case made by the bill in this case is this: An explosion in a coal mine killed 110 persons. The several administrators of these persons have brought several suits against the appellant

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as the owner and operator for damages, insisting that its negligence was the proximate cause of the accident. The appellant in effect says, if these actions are allowed to proceed at law, it will be ruined in costs and expenses, though it be successful in every suit; that the plaintiffs are all insolvent, and thus could not pay the taxed costs against them, should they be unsuccessful; that the suits are pending in different courts, and will be called for trial in different courts at the same time; that by reason of this, and the necessity of having the same witnesses in each trial, it is impossible for the defendants to present a proper defense to these multitudes of claims. The appellant says, moreover, that it has one and the same and a perfect defense or defenses to all these suits, which will be put forward in each case, and which will be determinative of all alike; and on this ground it is insisted that this is a plain case for the application of the jurisdiction of a court of equity to avoid a multiplicity of suits. We agree with this contention on principle.

"The first thing to obliterate from the mind in considering the question is that it is immaterial how the unity of title, claim, or defense is brought about. It is the *factum* of a single title against many, or a common defense against many, which is the foundation of the jurisdiction. A vested right of property and a vested cause of defense for protection against liability stand precisely on the same basis; and whence and how such right originated is wholly immaterial. 8 Cyc. 911; *Prichard v. Norton*, 106 U. S. 125, 132, 1 Sup. Ct. 102, 27 L. Ed. 104. If the unfortunate persons who lost their lives by the explosion had jointly leased the mine, and their administrators had instituted several actions, as in this case, against the owner, it is conceded that the privity between the plaintiffs established by the contract would justify a bill to have the question of liability determined in one suit. But why? Only because a single and common defense would, if successful, determine all the suits. Suppose, however, the owner leased to a third party, instead of the operators, and the same accident happened, and a thousand suits were brought or threatened by solvent, or especially by insolvent, parties; what reason is there for, or could there be for, denying the jurisdiction to enforce in a single suit the common cause of defense against all? Ingenuity, we think, cannot discover a substantial distinction between the two cases, under which the owner in one instance may take shelter in a court of equity against the wrongful and vexatious suits, while in the other he must submit to financial ruin in defending a thousand vexatious actions at law."

The learned Chief Justice Eyson then goes on to show, by reference to the case of *Lord Tenham v. Herbert*, 2 Atk. 483, and other English cases, that that doctrine has been "followed and approved in England to the present day." He especially refers to the case of *Sheffield Waterworks v. Yoemans*, L. R. 2 Chan. 8,

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decided in 1866. Chief Justice Tyson then proceeds further to show that the same view, the correct modern view, was approved in *Hale v. Allinson*, 188 U. S. 77, 23 Sup. Ct. 244, 47 L. Ed. 380, and in *Bitterman v. L. & N. R. R. Co.*, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171, decided in 1907, that great court in those two cases holding "that it did not require a common title, nor community of right or interest in the subject-matter, among the defendants, but only a common interest in the questions of law or fact in controversy." In concluding his opinion, Chief Justice Tyson reviews both the case of *Turner v. Mobile*, 135 Ala. 77, 33 South. 132, and *Tribette v. Railroad Co.*, 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642. In speaking of the case of *Turner v. Mobile*, he distinguishes that case from the fourth class of cases mentioned by Mr. Pomeroy; but he frankly says that there are many expressions in the opinion in *Turner v. Mobile* that cannot be approved, but that those expressions are not to be taken as decisions, but the *Turner Case* is to be looked at, as every case should be looked at, in the light of the exact facts before the court. He thus distinguishes that case, the case of *Turner v. Mobile*. Then, turning to the case of *Tribette v. Railroad Company*, *supra*, he says as follows:

"This case, however, of *Tribette v. Railroad Co.*, 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, is directly opposed to our views. That case we consider as overruled by the subsequent one in the same court of *Hightower & Crawford v. Railroad Co.*, 83 Miss. 708, 36 South. 83, 102 Am. St. Rep. 476, in which the court expressly approved the view repudiated in the *Tribette Case*. It is said in the *Hightower Case*: 'We think the doctrine announced by Pomeroy is sound and clearly established by the best-considered modern cases.' After this repudiation of the *Tribette Case* by the Supreme Court of Mississippi, we will not follow the reasoning of the opinion in that case to point out its deflection from and opposition, in our opinion, to the ancient, as well as modern, view of the extent of the jurisdiction of courts of equity in reference to multiplicity of suits. That jurisdiction is too well established and too beneficent, when wisely exercised, to be any longer called in question. It would be a strange casus in juridical evolution to meet the needs of society if there was no remedy against a party being vexatiously prosecuted at the same time by over 7,000 separate invalid claims held by insolvent plaintiffs, as in *Sheffield Waterworks Case*, L. R. 2 Chan. 8, when each case is founded upon the same facts, and when it is alleged and admitted, by the objection to the jurisdiction, that there is a defense common to all the claims. It is to avoid the monstrosity of such a result that the court of chancery extends its plenary jurisdiction to stay the proceedings at law until the question of liability can be determined in one suit, and therefore we hold that the bill in the case was well filed."

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There are one or two other observations due to be made. First, it is said by one of the learned counsel for appellant, that the principal controversy in this case is whether the Mobile, Jackson & Kansas City Railroad Company is liable, or the Gulf & Ship Island Railroad Company is liable. This is an ingenious effort to save the case, but it cannot suffice so to do. The injunctions here were not sued out on the ground that the complainant, the Gulf & Ship Island Railroad Company was likely to be held liable twice for the same injury, because it was sued individually, and also jointly with the Mobile, Jackson & Kansas City Railroad Company. Indeed, there could be but one recovery, and that recovery against one railroad could be pleaded in bar of any other suit for the same injury. Besides, the mere doubt as to which railroad was responsible falls far short of entitling this jurisdiction to be exercised, in view of the manifest differences in other respects, both as to principles of law applicable, and as to the different facts involved in the different suits by the different parties. Again, it must be remembered that there is a very marked difference between a "multiplicity of suits" and "a multitude of suits." It is not because there are so many suits that this jurisdiction is exercised; but it is only where, there being many suits, they may all be determined by the same principles of law and the proof of practically the same facts. In other words, mere multitude of suits does not confer this jurisdiction, but it is conferred solely by the existence of a condition precedent, no matter how many suits there shall be, that all of them may be determinable by the application of the same principles of law, and by the establishment of practically the same facts. See *High on injunctions*, p. 329; *Murphy v. City of Wilmington*, 6 *Houst. (Del.)* 139, 22 *Am. St. Rep.* 345. And especially see *Hale v. Allinson*, 188 *U. S.* 77, 23 *Sup. Ct.* 252, 47 *L. Ed.* 380.

We quote from this last case the following: "Manifestly, as it seems to me, the defendants have no common interest in these questions, or in the relief sought by the receiver against each defendant. The receiver's cause of action against each defendant is, no doubt, similar to his cause of action against every other; but this is only part of the matter. The real issue, the actual dispute, can only be known after each defendant has set up his defense, and defenses may vary so widely that no two controversies may be exactly, or even nearly, alike. If, as is sure to happen, differing defenses are put in by different defendants, the bill evidently becomes a single proceeding only in name. In reality it is a congeries of suits, with little relation to each other, except that there is a common plaintiff, who has similar claims against many persons. But as each of these persons became liable, if at all, by reason of a contract entered into by himself alone, with the making of which his codefendants had nothing whatever to do, so he continues to be liable, if at all, because he him-

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self, and not they, has done nothing to discharge the liability. Suppose A. to aver that his signature to the subscription list was a forgery; what connection has that averment with B.'s contention that his subscription was made by an agent who had exceeded his powers, or with C.'s defense that his subscription was obtained by fraudulent representations, or with D.'s defense that he has discharged his full liability by a voluntary payment to the receiver himself, or with E.'s defense that he has paid to a creditor of the corporation a larger sum than is now demanded? These are separate and individual defenses, having nothing in common; and upon each the defendant setting it up is entitled to a trial by jury, although it may be somewhat troublesome and expensive to award him his constitutional right. But, even if the ground of diminished trouble and expense may sometimes be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many, counsel will no doubt be concerned, whose convenience must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The costs of witnesses will not in any degree be diminished, and, if some docket costs may be escaped, this is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions at law. We are in accord with the views thus expressed, and we therefore must deny the jurisdiction of equity, so far as it is based upon the asserted prevention of a multiplicity of suits." The above we think directly applicable to this case.

Finally, there is one other most important fact to which attention should be called, and that is that the Gulf & Ship Island Railroad Company, in all its bills, never once set up its defense to any of the several actions. It merely says that it was not liable, without showing by any statement of facts, why it was not liable in any of the cases. Before any injunction should be issued in the exercise of this jurisdiction, the bills should show, by a statement of the facts, plainly, that the complainant has a good cause of action, whether by way of claim or defense, either legal or equitable. It need not necessarily be an equitable cause of action. This principle is clearly stated in Pomeroy, Equity Jurisdiction, vol. 1, p. 365: "In the first place, and as a fundamental proposition, it is plain that prevention of a multiplicity of suits is not, considered by itself alone, an independent source or occasion of jurisdiction, in such a sense that it can create a cause of action where none at all otherwise existed. In other words, a court of equity cannot exercise its jurisdiction for the purpose of preventing a multiplicity of suits in cases where the plaintiff invoking such jurisdiction has not any prior existing cause

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of action, either equitable or legal—has not any prior existing right to some relief, either equitable or legal. The very object of preventing a multiplicity of suits assumes that there are relations between the parties out of which other litigations of some form might arise. But this prior existing cause of action, this existing right to some relief, of the plaintiff, need not be equitable in its nature”—citing *Storrs v. Pensacola & A. R. R. Co.*, 29 Fla. 617, 11 South. 226, 231; *Roland Park Co. v. Hull*, 92 Md. 301, 48 Atl. 366; *Turner v. City of Mobile*, 135 Ala. 73, 33 South. 133, 141; *Purdy v. Manhattan El. R. R. Co. (Com. Pl.)*, 13 N. Y. Supp. 295; *Alleghany & K. R. R. Co. v. Weidenfeld*, 5 Misc. Rep. 43, 25 N. Y. Supp. 71, 76.

In the case of *Storrs v. Pensacola & A. R. R. Co.*, 29 Fla. 618, 11 South. 231, that able court said: “A reading of the bill discloses the fact that no community of title or right, or joint interest in the subject-matter of the suit, is alleged in the persons sought to be enjoined; but it does appear that there is a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind of relief asked against each individual person insisting on similar claims against appellee. In view of the fact that the bill fails to allege any sufficient defense, either at law or in equity, on the part of appellee in the suits instituted or threatened, it becomes unnecessary for us to decide whether or not its allegations are sufficient in other respects to justify the interposition of the court of chancery by injunction. The jurisdiction of chancery to prevent a multiplicity of suits cannot be extended to confer upon a party remedial rights where none of any kind existed before. Its exercise necessarily assumes that the complainant in the class of cases before us has some defense, either legal or equitable, to the numerous suits instituted or threatened against him.”

There need be no apprehension that this court will ever recede from the doctrine approved by all the best-considered modern authorities, the doctrine as announced in *Pollard v. Okolona Savings & Trust Co.*, 61 Miss. 293, or that we will hesitate to approve the exercise of this equitable jurisdiction to prevent multiplicity of suits, in a case falling within the limitations marked out in that case, and in the later cases recently decided by this court. But, when this court is asked, on facts such as appeared in this record, to approve the exercise of this jurisdiction in this sort of case, it is asking what no court of equity could with any possibility be brought to consider for one moment.

Just look, in one closing view, at the incongruities of the situation. Here Mrs. Barnes has brought two actions at law, she being the widow of the deceased engineer, an employee of the Mobile, Jackson & Kansas City Railroad Company—one suit against the Mobile, Jackson & Kansas City Railroad Company, and one against the Mobile, Jackson & Kansas City Railroad

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Company and the Gulf & Ship Island Railroad Company jointly. Her husband was an employee of the one company, and not of the other. Her rights of action, as regards the two railroads, were distinct in many respects. So Goldsby sues, being an employee of the Mobile, Jackson & Kansas City Railroad Company, not an employee of the Gulf & Ship Island Railroad Company. One of the defenses against Mrs. Barnes is the contributory negligence of her husband. That defense is not pleaded against the other plaintiffs, and in some of these suits manifestly could not be pleaded against some of the plaintiffs. Mrs. Gilbert sues in the capacity of passenger on the Mobile, Jackson & Kansas City Railroad, and, it is to be specially noted, sues on an entirely distinct ground from any of the other suits, to wit, that the collision occurred from the negligence of the tower employee in not giving the proper signals to the engineers on the two engines on the two railroad trains. Here is a wholly different cause of action presented by Mrs. Gilbert from any in the entire list of cases. Again, the Mobile, Jackson & Kansas City Railroad Company sues the other railroad company for damages to its locomotive and cars, raising a question in which these two railroads are concerned, but with respect to which the other parties have no concern whatever.

And, lastly, the questions which arise in respect to section 4896, Code of 1906, under the facts in this record, are wholly different, according to the parties whose rights are being considered. In short, there is no possible view of the particular case made by the precise facts in this record under which the exercise of this equitable jurisdiction is entitled to be invoked. And let it always be kept religiously in mind that what a court always decides is the exact case made by the precise facts in the particular record examined.

From these views it follows that the decree of the court below was correct, and it is affirmed.

LAMPHEAR *v.* NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York, Jan. 26, 1909.)

[86 N. E. Rep. 1115.]

Railroads—Crossings—Injuries—Care Required.*—Where a path across a railroad right of way not at a public place, street, or highway had been constantly used by the public for many years, and the railroad company at one time established turnstiles there, a person killed while crossing at that point was not a trespasser, but a person as to whom the railroad company was bound to exercise reasonable care.

Railroads—Death at Crossing—Warnings.—Where, in an action for death while decedent was traversing a path over a railroad's right of way, defendant's counsel conceded that the path had been in constant public use for many years, such concession eliminated the question whether the evidence justified a finding of a public passageway and left only the question of the use by defendant's servants of reasonable care in giving suitable warning for the determination of the jury.

Railroads—Death at Crossing—Assumed Risk.—Where decedent was killed while crossing a railroad track on a path used for many years by the public for that purpose, the court properly refused to charge that decedent had no license to walk on the tracks, and took the risks incident thereto, and that no duty rested on defendant except not to intentionally or wantonly injure him.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Nellie H. Lamphear, as administratrix, etc., against the New York Central & Hudson River Railroad Company. Judgment for plaintiff, affirmed by the Appellate Division (125 App. Div. 900, 109 N. Y. Supp. 1135), and defendant appeals. Affirmed.

L. B. Williams, for appellant.

James E. Newell, for respondent.

*For the authorities in this series on the question, what does, and does not, constitute a license to travel on a railroad track or right of way, see foot-note of *Caldwell v. Minneapolis & St. L. R. Co.* (Iowa), 28 R. R. R. 588, 51 Am. & Eng. R. Cas., N. S., 588; second foot-note of *Bailey v. Lehigh Valley R. Co.* (Pa.), 31 R. R. R. 167, 54 Am. & Eng. R. Cas., N. S., 167; first foot-note of *Alabama G. S. R. Co. v. Godfrey* (Ala.), 30 R. R. R. 421, 53 Am. & Eng. R. Cas., N. S., 421. For the authorities in this series on the subject of the care due from railroads to licensees, see foot-note of *Birmingham, etc., Co. v. Sawyer* (Ala.), 29 R. R. R. 779, 52 Am. & Eng. R. Cas., N. S., 779.

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GRAY, J. The deceased was struck by a train and killed, while attempting to cross the defendant's railroad tracks at a point where there was neither street nor highway, but only a footpath leading from one side to the other, through openings in the railroad fences. It was sought, upon the trial, to bring the case within the rule laid down in *Keller v. Erie R. R. Co.*, 183 N. Y. 67, 75 N. E. 965, where it was decided that whoever walks upon, or along, the tracks of a railroad, except when necessary to cross the same upon some street, highway, or public place, violates the law and is like a trespasser, and that the company's servants are under no other obligation than to refrain from willfully or recklessly injuring him. In that case, section 53 of the Railroad Law (chapter 676, p. 1394, Laws 1892) was held to be operative and to prohibit the use of a railroad track as a public way. It appeared that the public had been accustomed to make use of one of two intersecting railroad tracks, by walking upon it in order to reach and to cross the other, and in that way to make a short cut between streets. Such a practice, it was held, however long continued, could not create any right of user, by license, or by sufferance.

In the present case, there was evidence of the constant public use of the path for many years, and the defendant's counsel conceded the fact. The record, also, shows that the defendant had, at some time, put up turnstiles. The trial judge instructed the jurors that "it seems to be conceded that for a long series of years the public, with the acquiescence and with the permission and consent of the railroad company, had been accustomed to cross the railroad tracks at the point where this accident happened." To this no exception was taken, and when the instruction followed that the defendant was bound to use reasonable care to protect the persons from injury, whom it so permitted to cross at that point, the court was within the rule in such cases. *Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 289, 44 Am. Rep. 377; *Byrne v. N. Y. C. & H. R. R. Co.*, 104 N. Y. 362, 10 N. E. 539, 58 Am. Rep. 512. In those cases there was, as in the present case, a conceded right of way, or public passageway. If the nature of this present path as a public passageway had been in dispute, a different question might be presented, and the necessity of proper instructions to the jurors would be apparent. The question of whether the evidence justified a finding of a public passageway and of its submission to the jury was eliminated in this case, and only that of the use by the defendant's servants of reasonable care in giving suitable warning was left for determination. Requests therefore to charge the jury that the deceased had no license to walk upon the tracks, that he took the risks incident thereto and of the dangers to which he might be exposed, and that no other duty rested upon the defendant than not to intentionally or wantonly injure him, were properly refused.

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The trial judge left it to the jury to determine whether, on the conceded facts and the evidence upon the subject of showing a light, or of blowing a whistle, or of ringing a bell, the defendant had exercised reasonable care. We think that there was no error in the submission of the case.

No other question demands consideration, and the judgment should be affirmed.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. HISCOCK, J., not voting.

Judgment affirmed, with costs.

CHESAPEAKE & O. RY. CO. v. HALL'S ADM'R.

(Supreme Court of Appeals of Virginia, March 11, 1909.)

[63 S. E. Rep. 1007.]

Trial—Demurrer to Evidence—Conclusiveness of Evidence.—On demurrer to plaintiff's evidence, matters covered by it must be taken as established.

Railroads—Crossing Accidents—Contributory Negligence—Signals—Failure to Give.*—A railroad company is not liable for a death at a road crossing for failing to give statutory signals, if another or other warnings were given which in fact notified decedent of the train's approach, or which would have given her notice, if she had used ordinary care, so that she could have avoided the accident.

Railroads—Crossing Accidents—Contributory Negligence—Duty to Look.†—Decedent was guilty of contributory negligence precluding

*For the authorities in this series on the question whether it is contributory negligence to fail to give crossing signals, see last foot-note of *Southern Ry. Co. v. Daves* (Va.), 30 R. R. R. 455, 53 Am. & Eng. R. Cas., N. S., 455; last foot-note of *Kujawa v. Chicago, etc., Ry. Co.* (Wis.), 30 R. R. R. 195, 53 Am. & Eng. R. Cas., N. S., 195.

For the authorities in this series on the subject of the combined effect of the contributory negligence of the highway traveler and failure to give crossing signals, see first foot-note of *Union Pac. R. Co. v. Entsminger* (Kan.), 29 R. R. R. 342, 52 Am. & Eng. R. Cas., N. S., 342; first foot-note of *Gehring v. Atlantic City R. Co.* (N. J.), 27 R. R. R. 575, 50 Am. & Eng. R. Cas., N. S., 575.

For the authorities in this series on the question whether it is actionable negligence to fail to give crossing signals where the person struck by the train knew of its approach in time to have avoided the collision, see second foot-note of *St. Louis, etc., Co. v. Ferrell* (Ark.), 26 R. R. R. 742, 49 Am. & Eng. R. Cas., N. S., 742; foot-note of *Black v. Bessemer, etc., Co.* (Pa.), 22 R. R. R. 55, 49 Am. & Eng. R. Cas., N. S., 55; last foot-note of *Hutchinson v. Missouri Pac. Ry. Co.* (Mo.), 22 R. R. R. 683, 45 Am. & Eng. R. Cas., N. S., 683; first foot-note of *Illinois Cent. R. Co. v. Willis' Adm'r* (Ky.), 22 R. R. R. 312, 45 Am. & Eng. R. Cas., N. S., 312.

†See third foot-note of *Smith's Adm'r v. Norfolk & W. Ry. Co.*

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recovery for her death, caused by being struck by an east-bound train while attempting to drive across the track, where she knew a train was approaching, though, on hearing that a train was approaching, she believed it was west-bound; where she could see the track east of the crossing for more than one-fourth mile; the train was rumbling, and apprised others in the neighborhood of its approach; she did not look down the track west of the crossing, though, had she done so, she could have seen the train from 685 feet to 3,000 feet away.

Railroads—Crossings—Negligence—Proximate Cause.†—Negligence of a railway company toward a traveler approaching a crossing does not excuse him from performing his reciprocal duties, and is not actionable, unless the proximate cause of his injury.

Railroads—Crossing—Travelers—Duty.†—A traveler in a highway must look and listen for trains before he attempts to cross the track, and, if by a proper use of his faculties he can escape injury, he is guilty of contributory negligence precluding recovery in not using them; he being required to look in every direction that the rails run, and to look and listen when such acts will be effective.

Negligence—Contributory Negligence—Emergencies.§—The rule that one in an emergency or great peril need not exercise the care required of prudent persons in ordinary circumstances does not apply, where his fault has created the peril; applying only where he has been placed in the situation by negligence of defendant.

Railroads—Crossing Accidents—Last Clear Chance Doctrine—Applicability.||—The last clear chance doctrine cannot be applied to an

(Va.), 29 R. R. R. 715, 52 Am. & Eng. R. Cas., N. S., 715; first foot-note of *Riedel v. Wheeling Traction Co.* (W. Va.), 29 R. R. R. 768, 52 Am. & Eng. R. Cas., N. S., 768; fifth head-note of *Southern Ry. Co. v. Hansbrough's Adm'r* (Va.), 28 R. R. R. 1, 51 Am. & Eng. R. Cas., N. S., 1; first foot-note of *Stotler v. Chicago & A. Ry. Co.* (Mo.), 27 R. R. R. 765, 50 Am. & Eng. R. Cas., N. S., 765.

†See first foot-note of *Smith's Adm'r v. Norfolk & W. Ry. Co.* (Va.), 29 R. R. R. 715, 52 Am. & Eng. R. Cas., N. S., 715; first foot-note of *Southern Ry. Co. v. Hansbrough's Adm'r* (Va.), 28 R. R. R. 1, 51 Am. & Eng. R. Cas., N. S., 1; second head-note of *Rogers v. Rio Grande W. Ry. Co.* (Utah), 27 R. R. R. 567, 50 Am. & Eng. R. Cas., N. S., 567; second foot-note of *Harris v. Southern Ry. Co.* (Ga.), 27 R. R. R. 508, 50 Am. & Eng. R. Cas., N. S., 508; first foot-note of *Louisville & N. R. Co. v. Taylor's Adm'r* (Ky.), 27 R. R. R. 228, 50 Am. & Eng. R. Cas., N. S., 229.

§See second foot-note of *McFeat v. Philadelphia, etc., R. Co.* (Del.), 30 R. R. R. 254, 53 Am. & Eng. R. Cas., N. S., 254; first head-note of *Davis v. Chicago, etc., Ry. Co.* (C. C. A.), 30 R. R. R. 183, 53 Am. & Eng. R. Cas., N. S., 183; last foot-note of *Smith's Adm'r v. Norfolk & W. Ry. Co.* (Va.), 29 R. R. R. 715, 52 Am. & Eng. R. Cas., N. S., 715.

||For the authorities in this series on the subject of the application of the last clear chance doctrine, see third foot-note of *Denver City Tramway Co. v. Cobb*, 188, 54 Am. & Eng. R. Cas., N. S., 188; fifth head-note of *Paducah Traction Co. v. Sine* (Ky.), 30 R. R. R. 755, 53 Am. & Eng. R. Cas., N. S., 755; last foot-note of *Pilmer v. Boise Traction Co.* (Idaho), 29 R. R. R. 371, 52 Am. & Eng. R. Cas., N. S., 371.

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action for the death of one killed while attempting to cross a track in front of a train, though the fireman saw her approaching where, when he realized that she was going to attempt to cross, it was too late to save her; he having the right to assume that she would not attempt to cross in front of the train, which was rapidly approaching in plain view.

Appeal from Circuit Court, Hanover County.

Action by Laura Alice Hall's administrator against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

H. Taylor, Jr., for appellant.

Leake & Carter and *H. Carter Redd*, for appellee.

HARRISON, J. The administrator of Laura Alice Hall, deceased, brings this suit to recover of the Chesapeake & Ohio Railway Company damages for its alleged negligent killing of the plaintiff's intestate at a public crossing at Beaver Dam, a station in the county of Hanover.

The case has been twice tried, the first trial resulting in a verdict in favor of the plaintiff, which verdict, on motion of the defendant company, was set aside. Upon the second trial the same evidence as that taken on the first trial was introduced, to which the defendant demurred. The court overruled the demurrer to the evidence, and gave judgment in favor of the plaintiff for the damages which had been ascertained by the jury. The defendant company asks that this judgment be reversed, and that this court will, on the demurrer to the evidence, enter judgment in its favor.

On the day of the accident in question, the plaintiff's intestate was in Thompson's store at Beaver Dam station making some purchases, when Mr. Thompson came to the west door of the store and called to his son, who was waiting on the deceased, and told him that the train which he (the son) had to meet was coming. Thereupon the younger Thompson and the deceased left the store together, the former with the declaration that he had to meet the train, and running in the direction of the crossing, which was very near the depot, while the deceased followed in her buggy until her horse was nearly across the track, when the buggy was struck by the engine of an east-bound passenger train, and she was killed.

There was a train shortly due at Beaver Dam from the east going west, a fact known to the deceased, and it is claimed that it was this train she supposed was coming, and not one from the west.

From Thompson's store to the little bridge in the county road where she turned to cross the track, a distance of more than 100 yards, she was facing west, and could see the railroad from

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that direction for a distance of more than one-fourth of a mile. The deceased, therefore, had ample opportunity to discover that no train was in sight from that direction. Besides, no train coming from the east was a source of danger to any one crossing the track, because, as shown, all west-bound trains stop before reaching, or just as they reach, the crossing to take water.

The train by which plaintiff's intestate was killed was the second section of a passenger train, running east at a rate of speed variously estimated at from 40 to 60 miles per hour. On the demurrer to the evidence it must be taken as proven that the engineer did not sound the crossing signal nor ring the bell, as prescribed by the statute. The station whistle was blown, however, and such other noises made by the approaching train that practically every one about the crossing heard and knew that the train was rapidly approaching. Although the statutory crossing signals were not given, yet if the defendant gave another or other warnings which in fact notified the plaintiff's intestate of the approach of the train, or which would have given her notice if she had been exercising ordinary care, so that she could have avoided the injury, she would not have been entitled to recover. *A. & D. R. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590; *Simmons v. Southern Ry. Co.*, 96 Va. 152, 31 S. E. 7.

Admitting, however, that the defendant was guilty of actionable negligence in approaching the crossing without sounding the warnings required by statute, the plaintiff could not recover in this case, because his intestate is clearly shown to have been guilty of contributory negligence.

It is not to be lost sight of, in a case like this, that the negligence of the railroad company does not excuse the performance of the traveler's reciprocal duties. Such negligence does not entitle the plaintiff to recover, unless it be the sole proximate cause of the injury complained of. It is the duty of the traveler, in the full enjoyment of his faculties of hearing and seeing, upon a highway approaching a railroad crossing, before he attempts to drive or pass over, to exercise a proper degree of care and caution, and to make vigilant use of his eyes and ears for the purpose of ascertaining whether a train is approaching; and, if by a proper use of his faculties he could have escaped injury, and fails to do so and is injured, he is chargeable with contributory negligence, and cannot maintain an action against the company, and this rule applies although the railroad company fails to give the proper cautionary signals. He must look in every direction that the rails run to make sure that the crossing is safe, and his failure to do so will, as a general rule, be deemed culpable negligence; and the looking and listening must be when to look and listen will be effective. The duty to look and listen imposed upon a traveler on a highway approaching a railroad crossing is a continuing duty; and, if there is any point at which,

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by looking and listening, a person injured could have avoided the accident, and failed to do so, then he has neglected to discharge a duty which the law imposes, and his contributory negligence defeats a recovery for the injured. These principles are firmly established, and are reiterated in numerous decisions of this court. *Southern Ry. Co. v. Hanbrough*, 107 Va. 742, 60 S. E. 58; *Smith v. N. & W. Ry. Co.*, 107 Va. 729, 60 S. E. 56; *Southern Ry. Co. v. Jones*, 106 Va. 412, 56 S. E. 155; *Stokes' Adm'r v. Southern Ry. Co.*, 104 Va. 817, 52 S. E. 855; *Brammer's Adm'r v. N. & W. Ry. Co.*, 104 Va. 50, 51 S. E. 211.

From Thompson's store to the little bridge in the county road was a very short distance. When the plaintiff's intestate turned at the bridge to proceed across the railroad track, she could see west along the railroad an approaching train for a distance of 685 feet. Her father was on the opposite side of the track, and in front of her, and shouted at her and waived to her, with the object of getting her to turn off and not go upon the track in front of the approaching train, but his efforts to attract her attention were as unavailing as the roaring of the train which had apprised every one else of its approach. As she approached the track from the bridge, she could see farther and farther west, and when she was 29 feet from the center of the track, had she looked, she could have seen a train approaching from the west for a distance of more than 3,000 feet.

It is manifest that after turning at the bridge she did not once look to the west. Had she done so, it would have been impossible for her to have failed to both see and hear this fast approaching train, which, according to the plaintiff's testimony, was rumbling so as to shake the ground and houses in the vicinity of the depot and crossing. The facts of this case admit of no other conclusion than that this unfortunate lady never once looked to the west to ascertain if the crossing was safe from danger in that direction until her horse was on the rails, when it was too late to avert the calamity which inevitably followed. Why she did not look we do not know, but it is clear that her thoughtless disregard of this obvious duty was the proximate cause of her death, and precludes the right of recovery.

It is claimed that the deceased, a woman, was in a perilous position, and that a person in an emergency or great peril is not required to exercise the prudence required of prudent persons under ordinary circumstances.

This principle does not apply in a case like this, where the party has been brought into the peril which disturbs the judgment by their own fault. It is only applicable where the person has been placed in the situation of danger by the negligence of the defendant, not united with his own negligence. *Smith v. N. & W. Ry. Co.*, *supra*.

Nor has the doctrine of the last clear chance any application

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to the facts of this case. The fireman first saw the deceased when she was about to turn upon the little bridge in the direction of the crossing, but he did not know that she was going to attempt to cross, and he had a right to presume that she was not going to drive on the track in front of a rapidly moving train in plain view. *Southern Ry. Co. v. Daves*, 61 S. E. 748. When he realized that she was going to attempt to cross, there was nothing that he could do to save her; he did not even have time to call to the engineer.

The judgment of the circuit court, upon the demurrer to the evidence, in favor of the plaintiff must be reversed and set aside, and this court will enter such judgment as the circuit court ought to have entered in favor of the defendant.

Reversed.

COMMONWEALTH v. BALTIMORE & O. R. Co.

(Supreme Court of Pennsylvania, Jan. 4, 1909.)

[72 Atl. Rep. 278.]

Railroads—Obstruction of Highway—Indictment.—An indictment, charging a railroad company with frequently and rapidly passing its trains over a highway, whereby it was obstructed and rendered dangerous, charges no offense.

Railroads—Negligence at Highway Crossings—Nuisance.*—Where a railroad company habitually runs its trains over a highway crossing at an unsafe rate of speed without giving reasonable signals, it may be indicted for committing a public nuisance.

Indictment and Information—Bill of Particulars.—Where an indictment charges no offense, it cannot be rendered sufficient by a bill of particulars.

Appeal from Superior Court.

The Baltimore & Ohio Railroad Company was convicted of rapidly passing its trains illegally across a public highway. From a judgment of the Superior Court [35 Pa. Super. Ct. 474] affirming the judgment, defendant appeals. Reversed.

*For the authorities in this series on the subject of railroads and things pertaining to railroads as nuisances, see last foot-note of *Mull v. Indianapolis & C. T. Co.* (Ind.), 29 R. R. R. 436, 52 Am. & Eng. R. Cas., N. S., 436; foot-note of *Taylor v. Seaboard A. L. Ry.* (N. Car.), 28 R. R. R. 83, 51 Am. & Eng. R. Cas., N. S., 83; first foot-note of *Cincinnati, etc., Ry. Co. v. Commonwealth* (Ky.), 27 R. R. R. 615, 50 Am. & Eng. R. Cas., N. S., 616; first foot-note of *Cowles v. New York, etc., R. Co.* (Conn.), 27 R. R. R. 72, 50 Am. & Eng. R. Cas., N. S., 72; foot-note of *Thomas v. Seaboard A. L. Ry.* (N. Car.), 25 R. R. R. 385, 48 Am. & Eng. R. Cas., N. S., 385; first head-note of *Chicago, etc., Ry. Co. v. Ely* (Neb.), 25 R. R. R. 171, 48 Am. & Eng. R. Cas., N. S., 171.

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Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

Norman E. Clark and Winfield McIlvaine, for appellant.

C. L. V. Acheson, Dist. Atty. and *T. H. W. Fergus*, Asst. Atty. and *Owen C. Underwood*, for appellee.

BROWN, J. The appellant was convicted in the court of quarter sessions of Washington county on a common-law indictment charging it with maintaining a nuisance. A motion to quash, on the ground that no crime was charged in the indictment, was overruled, as was a motion in arrest of judgment based on the same reason. The lower court was sustained by the Superior Court (35 Pa. Super. Ct. 474), and the narrow question passed upon by each of them is now before us.

The indictment charges that the defendant unlawfully kept and maintained a railroad track and way across a public highway, "and did use the said track and way for the frequent passing and repassing of trains, whereby the use of the said road, street, and public highway was and continues to be dangerous, obstructed, and straitened, so that the good citizens of this commonwealth could not and have not been able since to pass and repass upon and use the said public highway as they ought and of right should and were wont and accustomed to do." There is no averment that the appellant, in laying its track across the highway, created any obstruction, and the case does not belong to the class in which railroad companies have been held guilty of maintaining nuisances because they placed actual obstructions on the highways in constructing their tracks across them. *Northern Central Ry. Co. v. Commonwealth*, 90 Pa. 300; *Commonwealth v. Northern Central Ry. Co.*, 7 Pa. Super. Ct. 234. The learned judge of the Superior Court properly said that it is not the existence of the track on the highway that is complained of, but the alleged unlawful use of it.

Boiled down, the substance of what is charged in the indictment to be the offense of the appellant is the frequent and rapid passing and repassing of its trains over the highway, whereby the same was obstructed and rendered dangerous. Nothing more is to be found in the indictment, and counsel for the commonwealth frankly so admit, for their statement of the question involved is: "Can a railroad company be indicted and convicted under the common law for maintaining a nuisance at a grade crossing, arising from the manner of operating its trains, where no permanent physical obstruction of the highway is occasioned by the construction of its roadbed?" The question for determination, then, is not one of the sufficiency of the indictment under the act of March 31, 1860 (P. L. 427), which provides that every indictment shall be deemed and adjudged sufficient and good in law, which charges the crime substantially in the

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language of the act of assembly prohibiting the crime, or, if at common law, so plainly that the nature of the offense charged may be easily understood by the jury, but is whether any offense at all is charged. The court below was of opinion, concurred in by the Superior Court, that, if the defendant was dissatisfied with the sufficiency of the indictment, its remedy was an application for a bill of particulars. This is never a remedy for an indictment so defective that it charges no offense. 1 Bishop's New Criminal Procedure, § 646. A bill of particulars cannot give life to what was dead when it left the grand jury. By this indictment the commonwealth charges a nuisance arising from the frequent and rapid passing and repassing of the trains of the appellant over a public road or street—acts which are entirely lawful in themselves. If, in the exercise of an undoubted franchise, the railroad company so exercises it as to commit a public nuisance, its offense is the improper exercise of its franchise, which must be set forth and described in the indictment as the substantive offense. Where an act is not in itself necessarily unlawful or a nuisance, but becomes so by its peculiar circumstances and relations, all the matters necessary to show its illegality must be stated in the indictment. Clark's Criminal Procedure, 155. A bill of particulars, prepared by a distinct attorney, can never take the place of what must affirmatively appear on the face of an indictment to which the accused must plead.

The passing and repassing of appellant's trains over the highway are not complained of, and it is not even averred that they are allowed to cross it negligently. The frequent and rapid passing, without more, is the sole offense charged. Railroad companies may not habitually run their trains over highway crossings at an unreasonable and unsafe rate of speed without giving reasonable and proper signals of their approach for the protection of life and property. If they fail in the discharge of this duty, they are liable to indictment for nuisance. Wood's Law of Nuisances, 74; Louisville, Cincinnati & Lexington Railroad Co. v. Commonwealth, 80 Ky. 143, 44 Am. Rep. 468. But there is no such allegation here, and without it there is no essence in the offense charged.

With the statutory permission given to railroad companies to cross public highways with their tracks, there necessarily goes the right to frequently cross them, if the needs of the public, for whom railroad companies are incorporated, require the frequent movement of trains, and this is so of their speed. The indictment charges that the highway is obstructed by the rapid passing of trains. Slow passing would obstruct it more; but we need not dwell upon this, for the "very purpose of locomotion by steam upon railways is the accomplishment of a high rate of speed in the movement of passengers and freight. It is author-

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ized by law." *Reading & Columbia R. R. Co. v. Ritchie*, 102 Pa. 425. In the exercise of this lawful right a railroad company is under a constant duty to protect life and property by the proper regulation of the speed of its trains at danger points or by giving, without regard to their speed, reasonable and proper notice of their approach. Its failure to do so is not, however, presumed even in civil actions, but must be averred and proved, and when the criminal process of the commonwealth is invoked against it, this is still truer, for in all criminal prosecutions the presumption is always in favor of innocence and that no public duty was neglected. For neglect of such a duty in connection with the passing and repassing of its trains over the public highway this appellant might have been indicted, and an indictment containing the charge properly laid would be sufficient to support a conviction. No such neglect is here charged, but, instead, the appellant was indicted for what it lawfully had the right to do. As no crime was charged against it, the judgment on the verdict cannot stand. That judgment is that the appellant "abate the nuisance charged in the indictment." Upon the failure of a defendant to abate a nuisance after having been sentenced to do so, a writ will be directed to the sheriff, commanding him to abate it. *Taggart v. Commonwealth*, 21 Pa. 527; *Barclay v. Commonwealth*, 25 Pa. 503, 64 Am. Dec. 715. If this defendant continues to run its cars frequently and rapidly across the highway, and the judgment against it is to stand, is the high sheriff of Washington county to prepare a schedule regulating the frequency of the passing of the trains and their rate of speed at the crossing and take his stand there to see that his regulation is enforced? In no other way could he execute the sentence of the court, if commanded to do so, and yet this is the situation that might actually arise if the contention of the commonwealth should prevail that the defendant has been convicted of a nuisance.

The judgment of the Superior Court, as well as that of the court below, is reversed.

RUTHERFORD *et al.* v. IOWA CENT. RY. CO.

(Supreme Court of Iowa, June 4, 1909.)

[121 N. W. Rep. 703.]

Railroads—Operation—Negligence—Speed.*—No rate of speed of a train moving through an open country is negligence.

Railroads—Persons on Track—Death—Speed—Duty to Slacken.—Where defendant's employees had no reason to apprehend the presence of decedent or his cattle on the track, near a private crossing in the open country, when decedent was struck and killed, such employees were not required to slacken the speed of the train until the presence of decedent and the cattle on the track was actually discovered.

Railroads—Persons on Track—Death—Warning Signal.†—Where decedent saw the train by which he was struck and killed at such a distance, and for such a length of time, as would have enabled him to have gotten off the track before he was struck, the failure to sound warning signals was not the proximate cause of the injury.

Railroads—Persons on Track—Contributory Negligence—Instructions.‡—Where decedent, who was killed by a train while on defendant's track, was himself negligent in remaining on the track after he saw the approaching train, instructions that defendant owed him no duty until he was discovered in a perilous situation, that the engineer was not bound to keep a lookout for him, and was not bound to stop after discovering him, unless it was apparent that decedent could not or would not leave the track, and that the engineer might presume that decedent would do so until the contrary was manifested to him in some manner, were proper whether decedent was a trespasser or a licensee.

Railroads—Construction—Cattle Guards—Wing Fences.§—A railroad company is not required to construct cattle guards and wing

*See first foot-note of *Gorton v. Harmon* (Mich.), 30 R. R. R. 204, 53 Am. & Eng. R. Cas., N. S., 204.

†See foot-note of second preceding case.

‡For the authorities in this series on the subject of the care due from trainmen, licensees and trespassers on railroad tracks, see foot-note of *Southern Ry. Co. v. Fisk* (C. C. A.), 31 R. R. R. 148, 54 Am. & Eng. R. Cas., N. S., 148; third foot-note of *Alabama G. S. R. Co. v. Godfrey* (Ala.), 30 R. R. R. 421, 53 Am. & Eng. R. Cas., N. S., 421; extensive notes of *Wade v. Detroit, etc., Ry. Co.* (Mich.), 29 R. R. R. 200, 52 Am. & Eng. R. Cas., N. S., 200; foot-notes of *Melton v. Chesapeake & O. Ry. Co.* (W. Va.), 29 R. R. R. 190, 52 Am. & Eng. R. Cas., N. S., 190; fourth head-note of *Holland v. Missouri Pac. Ry. Co.* (Mo.), 29 R. R. R. 182, 52 Am. & Eng. R. Cas., N. S., 182.

§For the authorities in this series on the subject of the application of statutes requiring railroads to fence their tracks, see foot-notes appended to *Chicago, etc., Ry. Co. v. Hankin* (Iowa), 31 R. R. R. 232, 54 Am. & Eng. R. Cas., N. S., 232; first foot-note of *Mattes v. Great Northern Ry. Co.* (Minn.), 26 R. R. R. 104, 49 Am. & Eng. R. Cas.,

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fences at a private crossing in the country, either by the common law, or by Code, §§ 2022, 2054, 2057, in the absence of a request from the landowner.

Railroads—Escape of Cattle—Recovery—Rights of Owner.†—While the owner of stock, which have escaped on a railroad's right of way, is licensed to go thereon to recover them, he is but a bare licensee, as to whom the railroad company owes no higher duty than to a trespasser.

Railroads—Persons on Track—Private Crossings—Care Required.—A railroad company is not required to use the same care towards persons using private crossings as towards those using public ones.

Railroads—Private Crossings—Lookout—Duty to Keep.||—A railroad company is not required to keep a lookout for a landowner on the track at a private farm grade crossing.

Trial—Instructions—Construction as a Whole.—In an action for death of a landowner, on railroad tracks near a private farm crossing, an instruction that decedent was confessedly negligent in being on the track when he was struck; that defendant owed him no duty, except to exercise reasonable care after he was discovered on the track and his peril became apparent to the engineer—when construed with another instruction that decedent's contributory negligence would not defeat his recovery if, after he was discovered in a dangerous position, defendant failed to use ordinary care in stopping the train and preventing the injury, was not error.

Trial—Instruction—Construction as a Whole.—Where, in an action for the death of a person on a railroad track, the question of the engineer's reason to believe that decedent would leave the track before the engine struck him was submitted to the jury, instructions that the engineer was not bound to attempt to stop the train unless it was apparent to him that decedent was in a dangerous position, and the engineer had reason to believe that decedent could not leave the track, and if the engineer had reason to believe that decedent could not, or would not, leave the track, and that the train would pass without striking him, then defendant was entitled to a verdict, and that the engineer could presume that decedent would leave the track, unless he had some reason to believe that for any reason he would not do so, were proper.

Trial—Special Interrogatories.—In an action for death of a person

N. S., 104; foot-note of Illinois Cent. R. Co. v. Davidson (Ill.), 26 R. R. 51, 49 Am. & Eng. R. Cas., N. S., 51; third head-note of Wilmot v. Oregon R. Co. (Ore.), 25 R. R. 339, 48 Am. & Eng. R. Cas., N. S., 339.

†See foot-note on preceding page.

||For the authorities in this series on the subject of the duty to maintain lookouts on trains approaching crossings, see second foot-note of Southern Ry. Co. v. Daves (Va.), 30 R. R. 455, 53 Am. & Eng. R. Cas., N. S., 455; first foot-note of Louisville & N. R. Co. v. Gilmore's Adm'r (Ky.), 30 R. R. 412, 53 Am. & Eng. R. Cas., N. S., 412.

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on railroad track, special interrogatories, asking how far from decedent the engine was when the engineer first discovered that he was not far enough away from the track to clear the train, and whether the engineer, when he first saw defendant, had reason to believe that decedent for some reason was not able to care for himself, and whether he then used all reasonable means to stop the train, called for findings as to material, ultimate facts as authorized by Code, § 3727.

Appeal and Error—Discretion—Cross-Examination.—Exercise of discretion in refusing to limit the cross-examination of an adverse witness is not ground for reversal, in the absence of abuse.

Railroads—Persons on Track—Death—Last Fair Chance.—In an action for death of person on a railroad track, evidence held to sustain a finding that defendant's engineer did not discover decedent's peril in time to avoid the injury.

Appeal from District Court, Poweshiek County; W. G. Clements, Judge.

Action to recover damages for the death of John Rutherford, deceased, who was struck by a train being operated upon defendant's road, and received injuries from which he died. The case was tried to a jury, resulting in a verdict for defendant, and plaintiffs appeal. Affirmed.

J. H. Patton, for appellants.

John I. Dille and *Lyman & Lyman*, for appellee.

DEEMER, J. Prior to April 30, 1907, John Rutherford lived upon a 20-acre farm, owned by his wife, in Poweshiek county, Iowa. He owned land in his own right some few miles distant from where he resided. At the time mentioned he was about 76 years of age, but personally managed, not only the 20 acres of land upon which he lived, but other lands as well. Some years prior to his death he received an injury to one of his hips, and as a result one limb was rendered shorter than the other, and he habitually walked with a cane. The defendant company operates a line of railway, running north and south, through the 20 acres of land upon which Rutherford lived, leaving the house, barn, and orchard on the east side of the right of way, and the remainder of the land, or about one-third, on the west side. This one-third was either in grain or crops, and was used for agricultural purposes. In carrying its roadbed across the 20-acre tract the railway made a cut extending across the entire tract, and varying in depth from practically nothing at the north side of the land to from 7 to 10 feet at other places as it ran south. At or near the barn the railway constructed a private crossing across the right of way, in order that plaintiff might get from one part of the land to the other. This was done by making a ditch or cut west of the right of way down to the sur-

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face of the track which it crossed at grade, and from the railway proper to the westward, until it came to the surface of the ground, something like 70 feet west of the roadbed. At each end of this crossing there was a gate, the east one being 26 feet of the east side of the railway cut. This crossing had no cattle guards or wing fences, and nothing to prevent stock from going either north or south upon defendant's roadbed when they were let upon the right of way through the private crossing. About 180 feet north of this crossing the cut for the roadbed runs out, and, beginning with where the roadbed again came to the surface, there was a fill running north for a distance of 260 feet. This fill as it went northward became very high; in some places about 25 feet. Nine hundred and seventy-five feet north of the private crossing was another private crossing known as McDowell's.

On April 30th Rutherford, accompanied with his dog, started to drive four head of cattle over the defendant's right of way through the private crossing. When the cattle reached the roadbed they turned north, and ran up this roadbed to the McDowell crossing, where they were stopped by wing fences. The dog seems to have been with them at this time, and he got them turned around and started south again. The dog followed them down the track until some were struck and killed by a train. The train which struck these cattle also struck Rutherford, who was then upon the fill, above referred to, at a place where it was from 18 to 25 feet higher than the natural surface of the ground. There was testimony tending to show that there was no place on top of this fill where plaintiff could have stepped off in safety to have avoided a passing train; but this was denied by defendant's witnesses, who testified that there was a place at the base of the ballast, and upon the top of the dirt fill, where Rutherford could have stood in safety. From the McDowell crossing to a point about one-half mile south of the Rutherford crossing defendant's line of railway was practically straight, with nothing to obstruct the view of engineer or fireman. South of the Rutherford crossing about one-fourth mile was a public highway crossing, and it was upgrade from this point north to where Rutherford was killed. The train which did the damage came from the south. It was made up of an engine, a car of stock, and a way car, and it is claimed that it was being run at a high and dangerous rate of speed. However that may be, the cattle were first seen upon the track by one of defendant's employees at a point some 200 feet north of the Rutherford crossing. The exact point where the train was at that time is a matter in dispute. This much is established, however, that it struck and killed three head of the animals at or about the Rutherford crossing, throwing them toward the west. Continuing north, it struck Rutherford at a point between 300 and 350 feet north

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of the crossing, throwing him something like 60 or 70 feet toward the northeast. The train was stopped at or near the McDowell crossing. The engineer of the train said that he struck the cattle; that he saw Rutherford before the train struck him; that he (Rutherford) was standing with his cane in hand, facing the engine; and that he was making motions with his cane. All agree that Rutherford was trying to get off the track before the train struck him.

The negligence charged against defendant, and for which recovery is sought, consists of (1) in running its train at a high and dangerous rate of speed; (2) failure to stop the train after coming in full view of Rutherford; (3) in negligently and recklessly running the train upon Rutherford after it saw, or by reasonable care and diligence should have seen, him (Rutherford) upon the track; (4) failure to stop the train after it saw, or should have seen, Rutherford on the track. It is further charged: "That at the time defendant's said train came in plain view of the said John Rutherford upon said track, and when said train was about a quarter of a mile distant from where the said John Rutherford was struck and killed, the said John Rutherford was then and there greatly excited, and in a place of peril upon said track, and at a place where he was not able to extricate himself therefrom in time to save himself from the rapidly approaching train, which facts were then and there well known to defendant's servants and agents, who were then and there operating said train; that when said train came in view of the said John Rutherford upon said track, the said cattle were upon said track, and about halfway between said train and the said John Rutherford; that at the time the said John Rutherford excitedly signaled said train to stop by waving his cane and his arms; that the place on defendant's track where the said John Rutherford was at the time said train came in view was an exceptionally high fill, the grade descending abruptly on either side of defendant's track a distance of about 40 feet, and said track and sides of said fill were at the time covered with snow and ice, which facts were at the time well known to the servants and agents of the defendant; that defendant's said agents and servants could, by the exercise of ordinary care, have stopped said train before it reached the said John Rutherford, and after they saw, or by the exercise of reasonable care could and should have seen, that the said John Rutherford was upon said track, and in an excited condition, and in a place of peril from which he could not extricate himself in time to prevent being struck by said rapidly approaching train; that after coming in view of said John Rutherford upon said track a quarter of a mile distant from where said John Rutherford was struck and killed defendant failed and neglected to give any warning, either by ringing the bell, or by blowing the whistle; that the defendant

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failed to slow down its train or stop the same before striking and killing the said John Rutherford." The answer was a general denial and a plea of contributory negligence. The case was submitted to the jury upon certain specifications of negligence, and in answer to special interrogations the jury made the following findings: "How far from the decedent was the defendant's engine when the engineer first discovered that decedent was not far enough east to clear the train? Answer: Three to five feet. Did the engineer in charge of the train, at the time he first saw the decedent, have reason to believe that the decedent was not, for some reason, able to care for himself? Answer: No. When the engineer in charge of the train first saw the decedent on the fill, did he use all reasonable means at his command to stop the train? Answer: Yes."

The first point made for a reversal is that the court erred in not submitting to the jury the question of the rate of speed of the train as a separate ground of negligence, and in not submitting the question of defendant's failure to give warning signals after it discovered Rutherford upon the track in a place of peril. It is the rule, not only in this court, but of the authorities generally, that no rate of speed in a train moving over and in an open country is negligence. *Kinyon v. Railroad*, 118 Iowa, 349, 92 N. W. 40, 96 Am. St. Rep. 382; *Hartman v. Railroad*, 132 Iowa, 582, 110 N. W. 10. There is nothing in the case to show that the situation was such as to demand that the speed of the train be slackened at this particular place by reason of its situation and surroundings. So far as shown, neither the defendant nor its employees had any reason to apprehend that there would be either cattle or men at this particular place. There was no more reason, then, for slackening speed at this particular place than at any other until the presence of the cattle or the man were actually discovered upon the track. So that there was no error in failing to submit the rate of speed of the train as an independent ground of negligence. As to signals, it is not claimed that defendant omitted to give any of the statutory signals. The contention here is that, after seeing the cattle and the man upon the track, warning signals should have been given, and that these were negligently omitted by defendant company. The trouble with this contention is that, according to the testimony, Rutherford saw the train at such a distance, and for such a length of time, as to have enabled him to get off the track, and knew it was approaching him, and a warning signal would have done no good. Moreover, the record clearly shows that, when any of defendant's employees saw Rutherford, he was cognizant of the approach of the train, and must have known of its danger to him. Absence of warning signals could have been of no benefit to him, and failure to give them was not the proximate cause of the injury. There was no error in refusing to submit this specification of negligence.

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2. In several instructions the court charged that Rutherford was a trespasser upon defendant's track, and was guilty of contributory negligence in being in such a place. It further instructed that under such circumstances defendant owed him no duty until after he was discovered upon the track, and after his peril became apparent to the engineer. The court also instructed that the engineer was not bound to keep a lookout for Rutherford, and was not guilty of negligence in failing to look ahead for persons upon the track. It also instructed as follows: "And in this case, after the said Rutherford was discovered on the track by the engineer, the engineer was under no obligation to attempt to stop the train, unless it was apparent to the said engineer that the said John Rutherford was in a dangerous position, and he had reason to believe that the said Rutherford could not leave the track. And in this case, if the engineer had reason to believe said Rutherford would or could leave the track, and the train would pass without striking him, then your verdict should be for the defendant." It also gave the following: "If you find from the evidence that John Rutherford could have stepped off the track a sufficient distance to avoid being struck by the train without falling down the embankment, and he failed to do so, then he would be guilty of contributory negligence; and, if you so find, your verdict should be for the defendant. An engineer operating a locomotive may rightfully presume that a person on the railroad track will leave it upon the approach of his train until the contrary is, in some way, manifested to him. It is not the law that when a human being is discovered on the track, an engineer must stop his train, unless he has some reason to believe that for any reason the person will not leave the track. Therefore, if you find from the evidence that when the engineer saw the deceased upon the track, the engineer had no reason to believe that the deceased was in a perilous situation, then your verdict should be for the defendant." These instructions are challenged, and it is contended that Rutherford was not a trespasser upon the track. For the moment we may assume that he was not; but it is evident that, unless there be some excuse which does not appear in this record, he (Rutherford) was guilty of contributory negligence in going upon the railway track, and continuing thereon after he saw the approach of defendant's train. As applied to the doctrine of contributory negligence, there was no error in the instructions. We take it that the claim of error in the instructions with reference to Rutherford's being a trespasser is bottomed upon the proposition that, if he were a licensee upon the property, or was there in virtue of an implied invitation, it was the duty of the defendant to have kept a lookout to discover him upon the track, and that, as the engineer did not see him until he was within 160 feet of the place where he was struck, which was so near that he could

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not have stopped the train, he was guilty of negligence in not keeping a lookout to see if any one was on the track. This aspect of the case calls for a determination of the question as to whether deceased was upon the track at such a time and place as that defendant was bound to keep a lookout for him. The exact point made here is that, as defendant did not construct wing fences and cattle guards at the Rutherford crossing, animals using the said crossing were likely to go upon the road, and follow the right of way in either direction until they came to a guard and wing fences, and, having reached such point, they were likely to be killed, and were a menace to the traveling public; that in such situation there was an implied invitation to the owner to go upon the track to recover his animals; that in accepting such invitation he was not a trespasser, but, being there by invitation and as of right, it was the duty of the railway company to keep a lookout for him; and, that if it failed to do so, it was negligent. The trouble with this contention is that it assumes a duty upon defendant's part which is not created by statute, and did not exist at common law; that is to say, it assumes that it was defendant's duty to construct cattle guards and wing fences at the Rutherford private crossing. This duty is not imposed by law. Cattle guards and wing fences are only to be erected at public crossings, unless the owner of a private crossing requests them. See Code, §§ 2054, 2057, 2022. *Bartlett v. Railroad*, 20 Iowa, 188.

Of course, if the owner knows that his stock have escaped on the railway right of way, he is undoubtedly licensed to go upon the right of way to recover them, not only to save himself from loss, but also to protect the railway property. But in so doing he is a bare licensee, and the railway company owes him no higher duty than if he were a trespasser. *Masser v. Railroad*, 68 Iowa, 602, 27 N. W. 776; *Thomas v. Railroad*, 103 Iowa, 649, 72 N. W. 783, 39 L. R. A. 399; *Richards v. Railroad*, 81 Iowa, 426, 47 N. W. 63; *Thomas v. Railroad*, 114 Iowa, 169, 86 N. W. 259. A railway company is not required to use the same care toward persons using private crossings as it is toward those who are using public ones. *Balt. R. R. v. Keck*, 84 Ill. App. 159. It was immaterial then whether the trial court called Rutherford a trespasser or a bare licensee, for the duty which the defendant owed him was the same in either case; in other words, it was not required to keep a lookout for him because of the open farm crossing. There is no showing that Rutherford ever requested the construction of cattle guards or wing fences, and, under the law as it stood when the accident occurred, the defendant was not bound to construct them in the absence of such request. Chapter 96, p. 102, 32d Gen. Assem., was not in force when Rutherford met his death, and we have no occasion to consider the effect thereof in its bearing upon the law

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of the case. Even should we announce that defendant was derelict in its duty to maintain cattle guards, wing fences, etc., at the crossing, it would not follow that Rutherford was anything more than a bare licensee in attempting to rescue his cattle which had gone upon the right of way. Appellant's counsel place great reliance upon *Liming v. Railroad*, 81 Iowa, 246, 47 N. W. 66. That case is not in point. It was an action for damages caused by setting out of fires, and the sole question was whether or not defendant's act was the proximate cause of the injuries received by plaintiff while attempting to extinguish the fire.

3. Instruction No. 3, given by the court, reads as follows: "You are instructed that John Rutherford was confessedly negligent in being on the grade and railway track of the defendant, he being a trespasser at the time he was struck by the defendant's locomotive, and this negligence contributed to his death; and, under these circumstances, the defendant company owed him no duty, except the exercise of ordinary and reasonable care and diligence, after he was discovered on the track and grade, after his peril, if any, became apparent to the engineer on the train in question, to avoid injury." This should be read in connection with No. 4, reading in this wise: "The fact that the plaintiff was guilty of contributory negligence by going upon the defendant's railway track will not defeat his recovery if, after he was discovered in a dangerous position, if any, the defendant and its engineer failed to use ordinary care in stopping the train and in preventing the injury to the plaintiff, as hereinafter more fully explained." The third paragraph of the charge is challenged because of the fact that it states unqualifiedly that Rutherford was a trespasser, and confessedly guilty of contributory negligence. The effect of this statement, according to appellant's contention, was to direct a verdict for defendant. But the very next instruction says that, even though Rutherford were negligent, this would not defeat recovery, provided that defendant, after discovering him in a dangerous position, failed to use ordinary care to avoid injuring him. When these instructions are read together, no prejudicial error appears.

4. Instructions 12 and 13, already quoted, are challenged because it is said that thereby defendant's negligence was made to depend upon the belief of the engineer in charge of the train as to whether or not Rutherford could or would leave the track before the engine struck him. The rules announced in these instructions are correct, especially where, as in this case, the question of the engineer's "reason to believe" was submitted to the jury as a question of fact. The instructions have support in *Thomas v. Railroad*, 114 Iowa, 171, 86 N. W. 259; *June v. Railroad*, 153 Mass. 79, 26 N. E. 238; *Burg v. Railroad*, 90 Iowa, 106, 57 N. W. 680, 48 Am. St. Rep. 419. There is no error in the instructions.

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5. Error is predicated upon the submission of the special interrogations to the jury. Each of these seems to call for an ultimate and material fact, and the court was justified in submitting them. Code, § 3727. That they called for answers which were material, see the Thomas Case, *supra*.

6. Plaintiffs made the engineer of the train their own witness, and it is contended that his cross-examination was without limit and prejudicial. The extent of cross-examination of any witness is largely a matter of discretion with the trial court, and no reversal will be ordered on account thereof, unless it appears that there was an abuse of this discretion to the prejudice of the complaining party. *Player v. Railroad*, 62 Iowa, 726, 16 N. W. 347; *Glenn v. Gleason et al.*, 61 Iowa, 32, 15 N. W. 659. No such abuse of discretion is here shown as to justify a reversal.

7. Lastly, it is insisted that the answer to the special interrogations are without support, and that the general verdict is contrary to the testimony. The case was fairly submitted to the jury upon what is now denominated, for want of a better term, "the doctrine of last fair chance," and the instructions with reference thereto are in line with the rules applicable. When the engineer of the train approached the Rutherford crossing, he discovered the cattle at or near that place, and applied the emergency air brake, but could not, and did not, stop in time to avoid throwing them off and killing them. The engineer testified that he saw the cattle when he was about 200 feet away from them, and that he was watching them until after they were thrown from the track; that he did not see Rutherford until after he had passed the cattle and released his brake, when he discovered Rutherford about 160 feet ahead of the engine, standing upon the fill, and making some motions with his cane; that he (Rutherford) was standing about the end of the ties on the east side of the track. This engineer also testified that, as soon as he saw Rutherford, he put on the emergency brake, and that he kept it on until after the deceased was struck. He further testified that he did not discover that the engine was likely to strike Rutherford until it was within two or three feet of him, and that there was plenty of room upon the top of the fill for him to stand in and have avoided the collision. There is also testimony to the effect that all reasonable means were used to stop the engine after Rutherford's position upon the track was discovered. There is a decided and sharp conflict in the testimony regarding there being a place outside the ballast, and upon the top of the fill, where Rutherford might have stood and escaped injury, but this was for the jury, and it may have found that there was a shelf there of from one to two feet wide upon which he might have stood and escaped injury. There is no doubt under the testimony that he was trying to get off the track to avoid a collision, and that he saw the on-coming train in time to have done so had he been alert in his movements. The issuable

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facts were presented to the jury upon nonprejudicial instructions, and the jury found for defendant. With this finding plaintiffs, under our system of jurisprudence, must be content. The accident was most unfortunate, and the loss of human life is always to be regretted; but, in the absence of an affirmative showing of negligence, defendant should not be held responsible therefor.

No prejudicial error appears, and the judgment must be, and it is, affirmed.

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(Court of Appeals of Kentucky, Jan. 26, 1909.)

[115 S. W. Rep. 719.]

Railroads—Injury to Person Crossing Track—Contributory Negligence.*—One who knowing and seeing that a train is coming, attempts to cross the track just in front of it at a station, is guilty of contributory negligence, barring recovery, though it was a fast special running on the time of a regular, and he may have thought it was the regular, which was to have stopped there.

Appeal from Circuit Court, Boyle County.

"To be officially reported."

Action by John E. Tower's administrator against the Louisville & Nashville Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded for new trial.

Chas. R. McDowell, Chas. H. Rodes, and Benjamin D. Warfield, for appellant.

E. M. Hardin, Robt. Harding, E. V. Puryear, and John A. Rawlings, for appellee.

O'REAR, J. The intestate, John E. Tower, was struck and killed by a train on appellant's road at Mitchellsburg under these circumstances: He, as a volunteer, was carrying the mail bag for the postmaster to put it on the local mail train, known as No. 23, which was due to pass that station about 11:30 a. m. on a day in August. The post office was about 60 yards from the station. Mitchellsburg is an unincorporated hamlet, and the station is a flag station only, without telegraph facilities. The station and the post office were on the same side of the railroad track. Between the station and the main track was a siding. Passengers and others having business with the train crossed from the depot to the opposite side of the main track, where a walk of screenings or broken rock was provided. On the morning in question there was another train, called "first No. 23," which was running on the time of the

*See second foot-note of preceding case.

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regular 23; the first being a special train which had no occasion to stop at Mitchellsburg. There were passengers for the local, and a flag had been put out to signal it to stop. It was running as second No. 23, and was some distance behind the first. When decedent heard a train whistle for the station, the signal being given some 500 or 600 yards before the station was reached, he started in a run, or trot, for the station so as to get there before the train did, and to be in position, presumably, to deliver the mail bag. He did not know, we may assume, that No. 23 was being run in two sections. Instead of passing to the west of the depot, which was the public highway crossing, and which would have kept the approaching train in his view (it was going east), he passed on the east side of the station, which was not a public crossing, but which was used sometimes for passage by persons having occasion to cross the track. As he got to the edge of the side track, or upon it, according to some of the evidence, which in either event gave him a clear, unobstructed view of the tracks looking west for perhaps half a mile, he paused, looked toward the approaching train, which was running very fast, and making considerable noise, the exhaust of the applied steam, and other noises such as a heavy rapidly moving train gives forth, he paused an instant, gathered himself together, as some of the witnesses put it, sprang or hastened his speed so as to get across before the train should arrive. At that moment the train was about 200 to 225 feet from him. The width of the side track was about five feet, and the distance between the two tracks about nine feet. Just as he got to the edge of the main track, the end of the pilot of the engine struck him, and he was killed. The speed of the train was from 20 to 40 miles an hour; the evidence varying between those figures.

Appellee based this suit to recover for the death of his intestate upon the negligence of the railroad company in running the special train upon the time of a regular train at a dangerously high rate of speed by the station. And upon that theory he recovered a verdict and judgment. Appellant's main defense was, as it is the principal ground urged for a reversal of the judgment, that the intestate was himself guilty of such negligence as that his estate ought not to recover damages for his death. And that is the only question which we find it necessary to examine. For the purpose of this case it may be conceded that first No. 23 was running by Mitchellsburg station at a speed, considered with reference to the rights of passengers and licensees at the station, that was negligent. It may also be conceded that the intestate was a licensee at the station on that occasion, and even in the use of the way of crossing which he used. It is also conceded that nothing could have been done by those in charge of the train to stop it after the intestate was discovered to be in peril. There is no conflict in the evidence, except as to the speed of the train,

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and that in testing whether the peremptory instruction should have been given we assume to be stated by appellee's witnesses. There were at least four eyewitnesses to the accident. They all agree in their statements in all material points. They were people who were sitting or standing about in the vicinity of the station. They heard the train give the customary signals. They heard it coming, and those who noticed the fact (and at least two or three did) say it was making the noise of a train running very fast. They saw the intestate start with the mail pouch, were aware by his movements of his intention to cross the track ahead of the train, and were interested in watching to see whether he made it. They all saw him pause and look as he emerged from behind the depot, and then gather himself as for a spring or sudden movement, and some of them saw him accelerate his speed till he was struck by the train, while others, when they saw his movement indicating he was going to try to cross the track, glanced back towards the approaching train to see what his chances were. It was from the testimony of these latter that we are enabled to locate the distance of the train from the point of contact at the moment the intestate saw it and determined to make the dash to beat it. He had about 20 to 25 feet to go, while the train had about 225 feet.

It is argued for appellee that the intestate mistook the train he saw for the regular mail train No. 23, and thinking it was that train, and knowing that it customarily stopped at the station, thought that it would slow up enough before getting to the station to allow him to pass in safety. The argument is not an unreasonable conjecture; but it is only a conjecture. This train was carrying green signals on the engine pilot, indicating that it was a special. Whether the intestate knew what those flags signified is not shown. The train was running so fast that everybody who saw it and testified, some with the same, and none with no better facilities than the intestate for judging of that fact, said that it was evident that it was not going to stop. No trains stopped at that station except such as were flagged—that is, signaled by the station flag—and only certain ones were allowed to be flagged. While it may be that the intestate was mistaken as to the character of the train, and was misled into believing it would stop, it may be, on the contrary, that he discovered its true character, and that it would not stop, but thought that he could get across the track before it came by. The latter inference is logically deducible from these circumstances: Every one who saw it saw that it was not going to stop. All who heard it formed the same conclusion, and they were all correct. If it had been regular 23, and had been going to stop, it would not, at 225 feet distance have been coming at such high speed, nor emitting steam from the exhaust, as it was slightly downgrade from the west; nor, if it had been apparently going to stop at 225 feet distance, it would not have been necessary for intestate to have sprung forward on a run

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to cross ahead of it, as its speed in that event would not have been more than twice or three times his speed in a rapid walk, and he would have had ample time to have cleared the track without a sudden and unusual spurt of speed. It may be doubted whether there was evidence that the intestate thought the train was regular 23; but, whether regular 23 or not, it was evident to all observers that it was not going to stop at that station.

Appellee relies on two opinions of this court as supporting the verdict. One is *Illinois Central R. R. Co. v. Murphy*, 123 Ky. 787, 97 S. W. 729, 11 L. R. A. (N. S.) 352. *Murphy's Case* is unlike this. *Murphy* was unaware of the approaching train that struck him, while those on the train for quite a distance saw him, but did not slacken speed. We held that running the train at high rate of speed through a populous community—a city of more than 2,000 people, the railroad track being along or upon a street—was negligence as to licensees or even trespassers whose presence was known, or should, from the circumstances of constant use, have been anticipated. If *Murphy* had seen the approaching train, and continued upon the track, his case would have been more like this one than it is. The other case cited is *Nichols v. Chesapeake, Ohio & S. W. R. R. Co.* (Ky.), 2 S. W. 181. It is very near like the case at bar. The similar features are these: *Nichols* was crossing the main track at a station in a hamlet, when a regular passenger train was due there, and had been flagged to stop for passengers. The location of the depot buildings and tracks were substantially the same as in this case. A special came along on the time of the regular train, but without stopping. It was running very fast. As *Nichols* attempted to cross the track ahead of it it struck and killed him. *Nichols* was entitled to the care due a passenger. The points of dissimilarity are these: In *Nichols Case* the approaching train did not whistle, or give other warning of its coming. *Nichols* did not see it, or know of its coming. At least, there was some evidence that he did not, while other evidence was that he did. The question was therefore one for the jury. There may be other differences between the facts of that case and this one; but we think the real question presented by and decided in the *Nichols Case* is necessarily dependent upon the facts that he was ignorant of the approach of the special train and of its character. In *Nichols Case* the court used this language: "In this instance those in charge of the front engine knew, or the law requires them to know, that they were running on the time of the passenger train, or nearly so, that passengers were likely to be at this station and crossing the track, and that the train was likely to stop for them. Under these circumstances, the law declared that a known duty existed which required of those in charge of the engine which killed deceased to run it so as to avoid danger to human life." It was held to be willful negligence under such circumstances to run the special train at a high

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rate of speed by the station without warning or signal of its coming. As to whether Nichols saw the engine approaching, the court observed: "The testimony is conflicting as to whether deceased saw the engine coming or not. If he did, it is probable he did not notice, but what it was the passenger train, which was just behind it, and mistook the one for the other." As we have said, those facts made Nichols Case one for the jury, and, if those were the facts here, we would say the same of this case. The misunderstanding due to the opinion in Nichols Case grows out of the remark of the court last quoted. It was assumed as the law in this case that if one saw a train coming, which was on the time of a regular train, and due to stop at that station, that he might as a matter of law rely upon its stopping and govern his movements by that assumption, although it was erroneous in fact. Whether he did or did not see the train is a question of fact, which upon the conflicting evidence it was the sole province of the jury to decide. What its appearance was and what impression on his mind it was calculated to make would in that event have been also for the jury under the court's instructions as what constituted contributory negligence. Under our practice the court instructs the jury in general terms, leaving them to apply the facts. Our practice gives the jury great latitude in applying the facts to the law as contained in the instructions, so much so that it is not infrequent that the jury's finding is wholly at variance with the court's instructions, if they find that the facts exist upon which the instruction covering contributory negligence was based. But we have no way of certainly knowing whether the jury found the facts to be so, as their verdict is general. If they find for the plaintiff, no one can say whether they did not find as a fact that the injured person did not see the approaching train at all, whereas, in truth, they may have believed that he did see it, but that under the circumstances it was not negligence on his part; that is, not such absence of the care "and ordinarily prudent person would have exercised for his own safety under similar circumstances." The courts have no way, under the present practice of giving instructions in the most general terms, carefully avoiding details, of regulating the application of the law of contributory negligence. It may be, and there is a noticeable tendency in that direction, that more stress should be laid in the instructions upon the particular facts constituting such negligence.

But, where there is no dispute as to the facts upon which contributory negligence is based, there is nothing to be submitted to the jury. If the facts relied on as being contributory negligence are not such, under the most favorable aspect for the defendant, to constitute such negligence in law, then the trial court decides that they do not, and refuses to instruct upon that point, which eliminates it from the case as a defense. But where the facts

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are not disputed, and where they do not constitute contributory negligence, the court must also decide that matter, and instruct accordingly. It is always for the court to say what is the law, and the jury to find the fact if the fact is disputed. But, the fact being undisputed, the question is wholly one of law, in which case it was not a question of law as to what he might have thought from the appearances surrounding him. What he had the right to think might have been a question of law; but what he actually thought, never. The remark quoted from *Nichols Case* was in the nature of argument to show the probable non-existence of the fact relied on in defense as contributory negligence. It was not intended to state it as a proposition of law. If it should be the law that, when one sees a train coming on the time of the regular train, he may, without further investigation, and can in spite of contrary appearances, rely upon the assumption that it is the regular train, and that it will stop where the regular train usually stops, and under those assumptions put himself ahead of it upon its track, in spite of the intelligence necessarily conveyed by his senses, then the verdict in this case must stand; otherwise not.

Let us review the decisions declaring the law upon that point, and points so analogous in principle, as to justify the application of the same rules.

In *Greshem's Adm'r v. L. & N. R. Co.*, 24 S. W. 869, 15 Ky. Law. Rep. 599, a boy was run over and killed at Junction City where two railroads cross. The boy saw the train approaching. It was 70 yards away. It was a regulation by statute that all trains should stop before crossing another railroad. But this train did not stop. The boy in attempting to cross the track in front of it, just beyond the intersection, tripped and fell. Before he could get up, the train had run over him. Had it stopped as the law required it should, he would not have been hurt by it. The court seems to have laid some stress on the fact that the boy was a trespasser, and that the statutory duty of stopping the train at the crossing was not owing him. But the court used this language as to the right of the boy to rely upon appearances: "Greshem evidently saw the train coming at a rapid rate of speed and close at hand, and, believing that he could make the crossing in safety, made the venture, and he would doubtless have succeeded but for the fact that he fell, which caused him to be overtaken and killed."

In *Helm v. L. & N. R. Co.*, 33 S. W. 396, 17 Ky. Law Rep. 1004, the injured person was a volunteer assisting the station agent. The station was a flag station. There were passengers to take the train at that station. The train failed to sound the whistle announcing its approach in time for the agent, or the one acting for him, to get across the track in time to display the signal for it to stop for the passengers. Nevertheless he at-

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tempted it, and was struck and injured. The court said: "The appellant discovered the train was coming, and he negligently attempted to cross the track in front of it." No doubt he believed he could succeed. He misjudged the train's distance or speed. The verdict was for the defendant. It was affirmed. But there was an error which would have reversed the judgment but for the fact that this court found from the facts, admitting all that appellant claimed as true, that he could not recover on account of his own negligence.

In *Illinois Central R. R. Co. v. Willis' Adm'r*, 123 Ky. 636, 97 S. W. 23, Willis, a licensee, was upon a siding on the appellant's road. He saw or heard a train approaching, and fearing it would frighten his horses, which he had left on the opposite side of the main track in charge of his little son, he hastened to cross in front of the rapidly moving train. It struck and killed him. The court said of his conduct: "Deceased evidently saw the train approaching. He thought he could cross over the track before it reached him. He made the venture, miscalculated the speed at which the train was approaching, and was killed." A peremptory instruction was ordered on the ground that his death was due to his own negligence.

In *L. & N. R. R. Co. v. Taaffe's Adm'r*, 106 Ky. 535, 50 S. W. 850, it was said: "It was the duty of the decedent, if he had notice of the approach of the train to the station, to exercise reasonable care to ascertain the proximity of the train to the station, and to be careful not to expose himself to any danger by walking upon or near the track upon which the train was approaching; and it was his duty if he heard the whistle, indicating its approach to the station, to be on the lookout for the same, and to keep himself out of danger."

The case of *Craddock v. L. & N. R. R. Co.*, 16 S. W. 125, 13 Ky. Law Rep. 18, is very much like this case. Craddock was on the platform of the passenger depot. He heard a train whistle for the station, and saw it coming. He started to cross the track in front of it, but at a point where he, a licensee, had the right to cross, or at least where the railroad company was bound to anticipate his presence. That train did not stop at that station. Some trains stopped there and some did not. Craddock testified that he thought it was going to stop. It was running at a negligent rate of speed—negligent as to Craddock, so held by this court, and it was added: "Yet this did not authorize the appellant to negligently throw himself in the way of it when he had ample warning of its approach, and then claim damages for any resulting injury." As to what would constitute "negligently throwing himself in the way" of the train the court cited: "He knew the train was approaching, and very near at hand. He had been warned of its approach by repeated blasts of the whistle, and it

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was in plain sight. He saw it coming, and yet when within from 16 to 60 feet of him he attempted to cross the track."

In *Royster v. Southern Ry. Co.* (N. C.), 61 S. E. 179, one who knew a train was coming and only a short distance away stepped onto the track in front of it after he had passed around a car without looking to see where it was. In the opinion it was said: "If, with an approaching train in view, a person undertakes to cross the track in advance of the train, he cannot recover for the injury sustained [citing authorities]. Nor does the fact that the train is running unusually fast make any difference, if the injured party knows that it is coming."

In *Thompson on Negligence*, 1 Sup. 27, § 186, it is stated: "One who recklessly encounters a known danger, and thereby directly contributes to his injury, cannot escape the effect of his negligence because the unknown negligence of defendant, which concurred to produce the injury, made the danger greater than he supposed it to be. So one who recklessly encounters a known danger cannot escape the effect of this rule on the ground that his action was the result of an error of judgment."

So long as we have the rule of law which makes contributory negligence a defense, instead of measuring the results of the negligence of the defendant and that of the injured party, and fixing liability in proportion of one to the other, the rule must be applied that he whose negligence is the proximate cause of the injury is the one at fault in law, and is the loser. Appellant's negligence in running its train too fast by the station was not the proximate cause of the intestate's death. His own negligence in going upon the track with knowledge of the defendant's negligence, or rashly or recklessly ignoring its negligence and "taking chances," was the proximate cause of his injury; for, but for it, appellant's negligence would have been harmless as to him. In all the cases cited where the fact was undisputed that the injured party knew of the train's approach, and heedless of it, or miscalculating the results, went upon the tracks just in front of the train, a recovery was denied. From these authorities we gather the principle of law to be that it is such negligence for one to go upon the railroad track just in front of a rapidly approaching train, which he sees or knows to be then coming in, that for his injuries inflicted by it, he cannot recover from the railroad company, not because it was free from negligence, but because his own negligence was the immediate and nearest cause of his injury. We think the undisputed facts of this case bring it within that principle, and the peremptory instruction should have been granted.

The other questions discussed are not decided.

Judgment reversed, and cause remanded for a new trial under proceedings consistent with this opinion.

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(Supreme Court of Wisconsin, Feb. 16, 1909.)

[119 N. W. Rep. 833.]

Negligence—Questions for Jury—Contributory Negligence.—Unless there is enough in the testimony to enable the court to say, as a matter of law, that plaintiff suing for a personal injury was guilty of contributory negligence, a nonsuit should not be granted on that ground.

Railroads—Crossings—Care Required of Travelers.*—One approaching the track of a steam railroad must look and listen for approaching trains, and must use his sense of sight at the last moment of opportunity before passing the line between safety and peril, and mere diversion of attention is not a sufficient excuse for a failure so to do, and he is not at liberty to calculate how long it will take an approaching train to reach the crossing if running at a lawful and usual rate of speed, but he must anticipate that it may be running at an excessive speed, and may reach the crossing before he can safely pass it.

Street Railroads—Crossing Tracks—Care Required of Travelers.*—One approaching street car tracks must, before crossing, use his senses of sight and hearing for approaching cars.

Negligence—Contributory Negligence—Burden of Proof.†—Contributory negligence must ordinarily be shown by affirmative evidence,

*For the authorities in this series on the subject of the care that must be exercised by a highway traveler to discover approaching trains before he attempts to cross railroad tracks, see last foot-note appended to *McFeat v. Philadelphia, etc., R. Co.* (Del.), 30 R. R. R. 254, 53 Am. & Eng. R. Cas., N. S., 254; second foot-note of *Gorton v. Harmon* (Mich.), 30 R. R. R. 204, 53 Am. & Eng. R. Cas., N. S., 204; first foot-note of *Boyd v. St. Louis S. W. Ry. Co.* (Tex.), 29 R. R. R. 742, 52 Am. & Eng. R. Cas., N. S., 742; second foot-note of *Smith's Adm'r v. Norfolk & W. Ry. Co.* (Va.), 29 R. R. R. 715, 52 Am. & Eng. R. Cas., N. S., 715.

For the authorities in this series on the subject of the duty of a highway traveler to look again, just before he attempts to cross railroad tracks, see second foot-note of *Denver City Tramway Co. v. Cobb* (C. C. A.), 31 R. R. R. 188, 54 Am. & Eng. R. Cas., N. S., 188, where all those preceding it are collected.

For the authorities in this series on the question whether a person about to attempt to cross railroad tracks has the right to presume that street cars or trains will not approach at an unlawful speed, see first foot-note of *Powers v. Des Moines City Ry. Co.* (Iowa), 29 R. R. R. 709, 52 Am. & Eng. R. Cas., N. S., 709; third foot-note of *Kuntz v. Oregon R. Co.* (Ore.), 29 R. R. R. 721, 52 Am. & Eng. R. Cas., N. S., 721; second foot-note of *Schwanenfeldt v. Chicago, etc., Ry. Co.* (Neb.), 29 R. R. R. 238, 52 Am. & Eng. R. Cas., N. S., 238.

†See second foot-note of *Chesapeake & O. Ry. Co. v. Rowsey's Adm'r* (Va.), 31 R. R. R. 6, 54 Am. & Eng. R. Cas., N. S., 6; first foot-note of *Baxter v. Auburn, etc., R. Co.* (N. Y.), 29 R. R. R. 359, 52 Am. & Eng. R. Cas., N. S., 359.

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or by logical inference from such evidence, and is not established by a mere absence of proof.

Street Railroads—Use of Streets.†—The right of a street railway company to the use of the public streets is not exclusive.

Street Railroads—Care Required of Travelers—Crossing in Front of Approaching Car.§—One crossing a street car track in advance of an approaching car has the right of way, and is not guilty of contributory negligence if, from the standpoint of a person of ordinary care so circumstanced, he has sufficient time, proceeding reasonably, to clear the track without interfering with the movement of the car, assuming that it is moving at a reasonable and lawful rate; but where the car is approaching at an unlawful rate of speed, and it is observable, he must take such speed into consideration.

Negligence—"Ordinary Care."—"Ordinary care" is that care which ordinarily prudent persons use in their business, or such care as the great mass of mankind observe in the transaction of human life.

Street Railroads—Injuries to Travelers—Contributory Negligence—Question for Jury.—In an action for injuries to a traveler in collision with a street car, evidence held to require the submission to the jury of the issue of contributory negligence.

Appeal from Circuit Court, Milwaukee County; Orren T. Williams, Judge.

Action by Anton Grimm against the Milwaukee Electric Railway & Light Company. From a judgment of dismissal, plaintiff appeals. Reversed, and remanded for a new trial.

This action is brought to recover damages for injury to person and to property. The plaintiff was the owner of a laundry sleigh and horse, and at about 5:30 o'clock p. m., of February 8, 1907,

†For the authorities in this series on the subject of the right to drive or walk upon or cross street railway tracks at points other than street crossings, see first foot-note of *Deutsch v. Trans. St. Mary's Traction Co.* (Mich.), 31 R. R. R. 133, 54 Am. & Eng. R. Cas., N. S., 133, where all those preceding it are collected, foot-note of *Miller v. Boston & N. St. Ry. Co.* (Mass.), 29 R. R. R. 215, 52 Am. & Eng. R. Cas., N. S., 215.

§For the authorities in this series on the subject of the right of way as between a street car and another vehicle or person, see second foot-note of *Deutsch v. Trans. St. Mary's Traction Co.* (Mich.), 31 R. R. R. 133, 54 Am. & Eng. R. Cas., N. S., 133; third foot-note of *Riedel v. Wheeling Traction Co.* (W. Va.), 29 R. R. R. 768, 52 Am. & Eng. R. Cas., N. S., 768.

For the authorities in this series on the subject of the right to cross street railway tracks in front of a car which is seen approaching, see last foot-note of *Deutsch v. Trans. St. Mary's Traction Co.* (Mich.), 31 R. R. R. 133, 54 Am. & Eng. R. Cas., N. S., 133; *Carrahan v. Boston & N. St. Ry. Co.* (Mass.), 30 R. R. R. 750, 53 Am. & Eng. R. Cas., N. S., 750; *Adam v. Union Electric Co.* (Iowa), 30 R. R. R. 218, 53 Am. & Eng. R. Cas., N. S., 218; fifth foot-note of *Riedel v. Wheeling Traction Co.* (W. Va.), 29 R. R. R. 768, 52 Am. & Eng. R. Cas., N. S., 768.

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delivered laundry to a building located on the west side of Third street, and about midway between Locust street on the north and Hadley street on the south. Third street is one of the principal business streets of the city of Milwaukee, and a double track street car line is operated thereon. While making the delivery the plaintiff's horse faced north, and stood adjacent to the curbing on the west side of the street. After the laundry was delivered, the plaintiff picked up the weight to which a line had been attached for the purpose of holding the horse, placed the weight in the sleigh, and stepped into the seat. While doing so, and before starting the horse, he looked to the north, and observed a south-bound street car approaching him, which, according to his calculation, was about 900 feet distant at the time. He immediately started to turn his horse around so as to proceed homeward. In making the turn it appeared that the front feet of the horse extended a little beyond the east rail of the south-bound track. The runners of the sleigh were carried over one, if not both, of the rails of the same track. Before the turn was completed, so that the sleigh would clear the passing car, the collision occurred which resulted in the injury and damage complained of. The sleigh was completely inclosed, having a vestibule in the front and a glass door in the rear. It also appears that there was a glass in the front of the vestibule, but whether or not it extended to the sides thereof does not appear from the testimony. The plaintiff testified that it would require less time than half a minute to make the turn. He also testified that, when he looked north and saw the car approaching, he also saw some people at the southwest corner of Third and Locust streets, apparently waiting to take the approaching car. The car did not stop there, however, and there is testimony tending to show that no warning was given immediately before the collision, and that the motorman did not make any attempt to lessen the speed of the car until it was too late to avoid the collision; furthermore, that there was nothing to obstruct the motorman's view of the plaintiff's vehicle. There was also some testimony tending to show that the car in question was proceeding at about twice the ordinary rate of speed. At the close of the plaintiff's evidence the court granted a nonsuit, on the ground that the plaintiff should have looked again in the direction of the approaching car, before entering upon the tracks, to ascertain whether it was safe to attempt to make the turn. Judgment was entered dismissing the complaint, from which judgment this appeal is taken. The error assigned is the ruling of the court in granting a nonsuit.

Houghton & Neelen, for appellant.

Clarke M. Rosecrantz, for respondent.

BARNES, J. (after stating the facts as above). The evidence fails to disclose the width of the street or the distance between

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the curb and the south-bound track. It is in many respects unsatisfactory, apparently because the witnesses were unable to express themselves understandingly. There is evidence from which the jury might have found that when the plaintiff took his seat in the sleigh and lifted in the weight to which the horse had been hitched, he looked north and saw a car approaching him, and about 900 feet distant, with an intervening street, upon the corner of which several people were standing, apparently for the purpose of taking the car; that plaintiff immediately started to turn around, but did not look again; that after partially making the turn, his back would be toward the approaching car and his vision otherwise obstructed; that in making the turn the front feet of the horse extended just beyond the east rail of the south-bound track; that the length of time that would be consumed in making the turn and clearing the track would not exceed half a minute, and might be somewhat less; that the car was running at an excessive rate of speed; and that the motorman failed to use reasonable precaution to prevent the collision. There was also some testimony in the case which tended to show that the car was somewhat further away from the plaintiff than he thought it was when he looked.

The question is, Do the facts stated present so clear a case of want of ordinary care on the part of the plaintiff as to warrant a trial court in saying that there was no question for the jury to pass upon in that regard? There is no evidence in the case tending to show that plaintiff was mistaken in estimating that the car was at least 900 feet away from him when he looked. His statement of the time it would take him to turn around so as to clear the track is an estimate, but does not appear to be an unreasonable one. If he only proceeded at the rate of 2 miles an hour, he would travel 88 feet in half a minute. It would seem that this was a greater distance than it was necessary for him to traverse in order to turn his vehicle and clear the track. Here again we find great uncertainty in the testimony as to the distance his horse in fact did travel, or the speed at which it traveled, before the collision. The speed of the approaching car would have to slightly exceed 20 miles per hour in order to travel 900 feet in one-half a minute. There is also a lack of testimony as to the usual and customary speed of cars in the outskirts of the city, and plaintiff does not give us the benefit of any knowledge or experience he may have had upon the subject. The lack of evidence on certain points enumerated, however, does not materially assist the contention of respondent. Unless there is enough in the testimony to enable a court to say, as a matter of law, that the plaintiff was guilty of contributory negligence, the nonsuit should not have been granted on that ground.

If plaintiff did not exercise ordinary care, it must be, as far as the testimony now before us discloses, because he failed to

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look again at the approaching car before driving his horse upon the tracks, or because he attempted to make the turn after observing that the car was but 900 feet from him. There is nothing to show, directly at least, that he drove unnecessarily slow, or that he continued to drive along the track a greater distance than was necessary. The testimony of the witness Kraschinsky is somewhat confusing upon the latter point; too much so, we think, to draw any reasonable inference therefrom. This court has many times defined the duty of a traveler to look and listen in approaching a railway track. Two such cases have been decided during the present term. *Clemons, Adm'r v. C., St. P., M. & O. Ry. Co. (Wis.)*, 119 N. W. 102, and *Smith v. C., M. & St. P. Ry. Co. (Wis.)*, 118 N. W. 638, and the decisions of the court upon this point are numerous; so numerous that the law thereon should be considered settled in so far as this court can settle it. But the rule is to be applied with reason. Manifestly the plaintiff could make no accurate estimate of the speed of the approaching car, considering the time of day, and where he was with reference to it. In the very short space of time it took him to swing his horse from the curbing to the car tracks the position of the car would, in all probability, no more indicate peril than did its position when he did look. If he had been mistaken as to the place the car was when he saw it, and it was in fact much nearer than he supposed, the peril might be avoided by a second look before driving his horse upon the track, but it does not appear that he was mistaken. If he was bound, under the peculiar circumstances of this case, to take a second look, it was because he was negligent in the first instance in conclusion to attempt to turn around. A person approaching the track of a steam railroad is bound to look for approaching trains, and must use his sense of sight at the last moment of opportunity before passing the line between safety and peril, and mere diversion of attention is not a sufficient excuse for failure so to do. He is not at liberty to calculate how long it will take an approaching train to reach the crossing if running at a lawful and usual rate of speed. He must anticipate that it may be running at an excessive speed, and may reach the crossing before he can safely pass it. *Clemons v. Ry. Co.*, *supra*; *Guhl v. Whitcomb*, 109 Wis. 69, 85 N. W. 142, 83 Am. St. Rep. 889; *Schroeder v. Wisconsin Central Ry. Co.*, 117 Wis. 33, 93 N. W. 837; *Koester v. C. & N. W. Ry. Co.*, 106 Wis. 460, 82 N. W. 295; *Schneider v. C., M. & St. P. Ry. Co.*, 99 Wis. 378, 75 N. W. 169; *Hain v. C., M. & St. P. Ry. Co. (Wis.)*, 116 N. W. 20; *Marshall v. G. B. & W. R. R. Co.*, 125 Wis. 96, 103 N. W. 249. The obligation to use the senses of sight and of hearing before proceeding to cross the tracks of a street railway company is no less mandatory than in the case of crossing the tracks of a steam road. *Goldmann v. T. M. E. R. & L. Co.*, 123 Wis. 168, 170, 101 N. W. 384; *Dummer v. T.*

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M. E. R. & L. Co., 108 Wis. 589, 84 N. W. 853; *Tesch v. Ry. Co.*, 108 Wis. 593, 84 N. W. 823, 53 L. R. A. 618; *Watermolen v. Fox River E. R. & P. Co.*, 110 Wis. 153, 85 N. W. 663. In the absence of any showing as to the distance the plaintiff's horse traveled, or the length of time it traveled after the plaintiff looked at the approaching car, and before it passed the danger line, the court can hardly assume that the failure to look a second time was negligence. The time may have been so short that the distance traveled by the car would have been a negligible factor in determining whether or not the turn might be made with safety. Contributory negligence is a defense that must ordinarily be shown by affirmative evidence, or by logical inference from such evidence, and is not established by a mere absence of proof. *Haetsch v. C. & N. W. Ry. Co.*, 87 Wis. 304, 58 N. W. 393.

Under the authorities cited, and many others that might be cited, if the plaintiff had driven on the tracks of a steam railroad under the circumstances that he entered upon the tracks of the street railway company here, the court might well say, as a matter of law, that he was guilty of contributory negligence. And this leads us to a consideration of the question whether any distinction should be drawn between the two classes of roads, particularly where one is operated in the busy streets of the city of Milwaukee. Important as the street railway lines are, it goes without saying that their right to the use of public streets is not exclusive. Cars are run on such lines, particularly at certain periods of the day, with great frequency. They make numerous stops, and do not attain that high velocity that is required on steam roads, where stops are comparatively infrequent. Street cars are usually run singly, and, necessarily, are run at times with reference to obstructions in their route. Steam roads run comparatively few trains, run them over their own right of way, and only occasionally cross a highway. They often run at great speed, and are usually heavy and cumbersome and cannot be readily brought to a standstill. This question was considered in *Tesch v. Ry. Co.*, *supra*, and while no comparison is made between the two classes of roads, what is there held is not in accord with the cases defining what is negligence in attempting to cross the tracks of a steam road. It is said: "A person desiring to cross a street car track in advance of an approaching car has the right of way if, calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced, he has sufficient time, proceeding reasonably, to clear the track without interfering with the movement of the car to and past the point of crossing, assuming that it is moving at a reasonable and lawful rate of speed. If a person, exercising his judgment as indicated, attempts to cross the track, and it turns out that he has miscalculated, he cannot be held guilty of a breach of duty to exercise ordinary care. If in the circumstances stated, other

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than the speed of the car, the car is approaching at an unlawful rate of speed, and it is observable by the person about to cross the track, by the exercise of ordinary care, he must take that into consideration in determining whether there is time to safely clear the track, the duty to exercise ordinary care for his own protection not being excused by the fault of anybody else." This rule is manifestly sound if ordinary care is "such care as persons of ordinary care and prudence observe in their business," or "such care as the great mass of mankind, or the majority of mankind, observe in the transactions of human life," under the same or similar circumstances. *Dreher v. Fitchburg*, 22 Wis. 675, 99 Am. Dec. 91; *Duthie v. Town of Washburn*, 87 Wis. 231, 233, 58 N. W. 380; *Nass v. Schulz*, 105 Wis. 146, 81 N. W. 133; *Hayes v. Ry. Co.*, 131 Wis. 399, 111 N. W. 471. A court cannot say, as a matter of law, that persons of ordinary care, using the streets of the city of Milwaukee, do not observe the distance cars are from the crossings and probable rate of speed at which they are proceeding, and do not calculate whether there is sufficient time to cross the tracks in advance of the car. If they did not do so, and waited until all cars were out of sight, they might find it difficult to cross at all.

The plaintiff had almost cleared the track when his vehicle was struck. A few steps further, as we read the testimony, would have placed him out of danger. If it is true, as one witness testified, that the car proceeded at twice the ordinary rate of speed, and that plaintiff could not determine from his location that the car was running at such an excessive speed, it would seem to be a fair question for the jury to say whether he was guilty of negligence in attempting to make the turn. Considering the facts as shown on this trial, and they are unsatisfactory in many important particulars, we think the court should have permitted the jury to say whether or not the plaintiff was negligent in attempting to turn around in the manner in which he did, the car which injured him being 900 feet distant from him at the time he started to make the turn.

Judgment is reversed, and cause remanded for a new trial.

WINSLOW, C. J., took no part.

LYNCH *v.* GREAT NORTHERN RY. CO. *et al.*

(Supreme Court of Montana, March 27, 1909.)

[100 Pac. Rep. 616.]

Railroads—Death of Person on Track—Action—Sufficiency of Complaint.—In an action against a railroad company and a mining company for wrongful death, while deceased was on the railroad track enveloped in steam, escaping from the mining operations, the complaint is insufficient, where it fails to show the place of the accident, whether at a street crossing, a place where employees of the mine were in the habit of crossing the track as licensees, or at some other place.

Railroads—Death of Person on Track—Signals for Crossing.*—The failure of trainmen to give proper signals for a crossing is not available to plaintiff, in an action for wrongful death on a railroad track, where the accident did not occur at the crossing.

Railroads—Accidents at Crossings—Signals—Pleading.—The allegation, in a complaint for the death of a person on a track, that "it was the duty of the railroad company to refrain from wantonly killing any human being on its track, and, in order to observe said duty, it would be necessary * * * to blow its whistle or ring its bell in approaching said steam," is insufficient to show any failure of duty by the company or its employees toward deceased.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

Action by Matilda Mary Lynch, administratrix of the estate of Timothy P. Lynch, deceased, against the Great Northern Railway Company and others. From a judgment for defendants on demurrer to the complaint, plaintiff appeals. Affirmed.

Breen & Hogevoil, for appellant.

Forbis & Evans, Kremer, Sanders & Kremer, and *I. Parker Veasey*, for respondents.

SMITH, J. The complaint in this action, after alleging the corporate character of the Great Northern Railway Company and the Boston & Montana Company, and the representative capacity of the plaintiff, reads as follows:

"(4) That the said defendants William Borden, Daniel Eaton, J. H. Kane, and Charles B. Foster now are, and have at all the times hereinafter set out been, citizens of the state of Montana,

*See foot-notes of *Illinois Cent. R. Co. v. Armstrong* (Miss.), 31 R. R. R. 199, 54 Am. & Eng. R. Cas., N. S., 199; foot-note of *Ellis v. Southern Ry. Co.* (C. C. A.), 31 R. R. R. 172, 54 Am. & Eng. R. Cas., N. S., 172.

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and have resided in the city of Butte in said state, and at the time of the injury hereinafter described were servants of the said railway company, and had charge of the engine and caboose that ran over the deceased as hereinafter set out.

“(5) That on or about the 5th day of February, A. D. 1908, the said defendants, acting jointly, and by their joint act of wanton and willful negligence, did strike, maim, and kill Timothy P. Lynch, the husband of this plaintiff, as follows, to wit: The said defendant Boston & Montana Consolidated Copper & Silver Mining Company has for a long time prior to the said date, and did on the said date, operate a mine known as the ‘Gambetta Mine,’ and from the said mine the said corporation willfully, wrongfully, and negligently exhausted steam on the track of the said railway corporation, through a certain pipe laid at said place by the said Boston & Montana Consolidated Copper & Silver Mining Company, and thereby did obscure the said track, and made it impossible for the other said defendants to see through the said steam, and thereby did cause injury hereinabove set out, by making it impossible for any person walking on the said track to see through the said steam, and no person could tell if a locomotive or cars came along while the said steam was obstructing the view of said track, and the said track was thereby made extremely and extraordinarily dangerous for pedestrians on the said track, and extremely dangerous for all persons that used said track who were by virtue of necessity, and as licensees, using said track. That the said exhaustion of steam had continued for at least a year before the 5th day of February, 1908.

“(6) That at the said place, near the said Gambetta mine, a great many mines are operated, and approximately 500 men, as a general rule, would, between the hours of 5 and 6 in the afternoon, at which time of the day the injury hereinafter described took place, use the said track as pedestrians for a distance of from 200 to 500 feet, or cross at a certain crossing about 200 feet north of the point where the injury hereinafter described took place. That approximately for 10 years previous to the said date the said number of men had, without objections from the said railway company, and by the said railway company’s license, and as a matter of necessity in going and coming to and from their work to mines surrounding the said track, used the said track as a footpath, and had been in the habit of crossing the said track at the said place, and at different places, where the said injury took place. That by virtue thereof the deceased, Timothy Lynch, was a licensee, and was rightfully on the track.

“(7) That the said railway company knew that their track was used in the manner as aforesaid, or by the exercise of ordinary care would have known that it was so used, and the said mining company well knew, or by the exercise of ordinary care ought to have known, that the said exhaustion of steam made

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the said track dangerous as aforesaid, under the condition as hereinabove set out, and the defendants William Borden, Daniel Eaton, H. J. Kane, and Charles B. Foster also well knowing the premises; but nevertheless the said defendant railway company, by its said servants, at some time between the hours of 5 and 6 in the afternoon on the 5th day of February, or thereabouts, in the year 1908, without blowing the whistle at the said crossing, and without looking ahead of the engine or caboose, and in great disregard of human life, attached a certain caboose in front of an engine, and ran from the north over the said crossing of a certain public highway, at the rate of 20 miles an hour, and by their gross negligence and wanton disregard of human life did kill Timothy P. Lynch, the husband of this plaintiff, while the said Timothy P. Lynch was acting with due care on his part, by running over the said Timothy P. Lynch by having their said caboose attached in front of the said engine, while the said engine was running at the rate of 20 miles an hour.

“(8) That the said railway company and its servants, well knowing the negligence of the said mining company by exhausting its steam, and well knowing it would be impossible for a person to get off of its track while in the said steam, did not ring the bell and did not blow the whistle a distance of from 50 to 80 rods from the said crossing.

“(9) That the said railway company and its servants, as it came to the said place where the said view was obstructed, expected that some human being would be run over by the said defendant railway company; and its servants, by reason of the fact as aforesaid, to wit, that miners were always on the track at said time and at said place, in utter disregard of human life, going at a dangerous rate of speed, then and there did run over the said deceased Timothy Lynch, and maimed and killed him as aforesaid.

“(10) That it was the duty of the said defendant railway company, and the duty of its said servants, to refrain from wantonly killing any human being on its track; and, in order to observe said duty, it would be necessary to ring the bell or blow the whistle, as hereinbefore set out, and also to blow its whistle or ring its bell in approaching said steam, and not to put a caboose in front of its engine, and thereby obstruct its own view, and not to go at an excessive rate of speed at a place where human beings were constantly known to be crossing or walking on the said track, and where human beings were expected to be. That it is the duty of the said mining company not to so construct and maintain its plant that dense volumes of steam would obstruct the view on the said track, and thereby prevent pedestrians, licensees, and employees and the said railway company and its servants from seeing each other and thereby prevent injury.

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"(11) That the place where the said Timothy P. Lynch was killed was in the suburbs of the city of Butte, known as Meaderville, in the county of Silver Bow, state of Montana."

Both corporation defendants filed separately general demurrers to the complaint, which were sustained; and, the plaintiff refusing to plead over, judgment was entered against her, and she appeals therefrom.

On account of the peculiar phraseology of the pleading we have devoted much time to an examination and analysis of this complaint, and necessarily so because the contentions of the respective parties involve questions of law of so great importance to litigants and the legal profession that the court is not satisfied to apply any of them on a foundation of mere conjecture as to the meaning of the complaint. The contention of the appellant appears to be that she is entitled to rely on what has come to be known in the law as the doctrine of the "last clear chance," applied to a case where the defendant should have known of the deceased's peril. Another contention is that a railroad company is bound to use reasonable care to prevent injury to persons who, for a long period of time, without objection from the company, have used the right of way as a convenient path or place of crossing, even though such persons are technically trespassers. Another contention seems to be that the company owed to deceased the duty to give the proper signals of warning before passing over a public highway crossing. The learned judge who tried the case said in his order that he did so on the authority of *Egan v. Montana Central Ry. Co.*, 24 Mont. 569, 63 Pac. 831. Appellant contends, in the brief of her counsel, that this case is distinguishable from the *Egan* Case, for the reason that her complaint alleges that the defendant knew her husband was in a place of peril, although he could not be seen. On the other hand, the respondent railway company claims that the case is squarely within the rule of the *Egan* Case, and should be affirmed on that authority, unless the court is prepared to overrule or modify that case.

The briefs are voluminous and exhaustive, and show great research of authority; and a decent respect for the counsel engaged, and their efforts to assist the court in arriving at a proper conclusion, bearing in mind also the importance of the case to the plaintiff, impels us to state our views with greater elaboration of detail than would otherwise appear to be necessary or desirable under the circumstances. It is first necessary to ascertain, if possible, from the complaint where Lynch was killed, because the location of that place is determinative of the question whether the defendants owed him any duty in the place where he was, and, if so, what duty. If we can determine where Lynch was located at the time he was struck and killed, we may then apply the proper rule of law to the conduct of the two de-

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fendants under the circumstances, and inform the plaintiff whether or not she may recover damages from one or both of them, provided, of course, that she is able to prove the allegations of her complaint. If we cannot decide where Lynch was located, it would be idle to attempt to apply any rule of law at all.

It is alleged, in paragraph 5 of the complaint, that the mining company, on February 5, 1908, operated the Gambetta mine, and from the said mine exhausted steam on the track of the railway company through a pipe laid at "said place." This allegation locates the place only to the extent that it was on the track of the railway. Paragraph 6 sets forth that, "at the said place, near the said Gambetta mine, a great many mines are operated, and approximately 500 men, as a general rule, would, between the hours of 5 and 6 in the afternoon, at which time of the day the injury hereinafter described took place, use the said track as pedestrians for a distance of from 200 to 500 feet, or cross at a certain crossing about 200 feet north of the point where the injury took place." We cannot determine from this allegation where the 500 men were in the habit of crossing, whether at the road crossing, or at a point several hundred feet away, or whether some of them crossed at one place, and some at another, or whether they used first one place and then the other. Nor is the matter made any clearer by the subsequent allegation that the men "used the said track as a footpath, and had been in the habit of crossing the said track at the said place, and at different places, where the said injury took place." We cannot tell from this allegation where the injury took place, or where the track was enveloped in steam, or whether the men simply crossed the track at a certain place, or at several places, or walked along the track laterally. Nor is there any allegation that Lynch was one of the men who were accustomed to use the track, or that he was with the men who were so using the track. There is no allegation here, or in any other part of the complaint, so far as we can discover, that Lynch was in the steam, or on the track at some place other than the public crossing.

Paragraph 6 appears to be an attempt to lay a foundation for the conclusion that Lynch was a licensee, and, viewed in that light, those allegations relating to the highway crossing become immaterial, because, if Lynch was on the Highway crossing, he was in a place where he had a right to be. In view of the allegation that the steam was so dense that Lynch could not be seen in any event, the allegation that the caboose was ahead of the locomotive appears to be immaterial. Paragraph 7 alleges that the "defendant railway company, * * * without blowing the whistle at the said crossing, and without looking ahead of the engine or caboose, and in great disregard of human life, at-

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tached a certain caboose in front of an engine, and ran from the north over the said crossing of a certain public highway, at the rate of 20 miles an hour, and by their gross negligence and wanton disregard of human life did kill Timothy P. Lynch, while the said Lynch was acting with due care on his part, by running over the said Lynch, by having their said caboose attached in front of the said engine, while the engine was running at the rate of 20 miles an hour." Then follows paragraph 8, as follows: "That the said railway company and its servants, well knowing the negligence of the said mining company by exhausting its steam, and well knowing it would be impossible for a person to get off of its track while in the said steam, did not ring the bell and did not blow the whistle a distance of from 50 to 80 rods from the said crossing."

It will be observed that while the foregoing paragraphs do not expressly aver that Lynch was on the crossing, they do so by implication, and if the contention were made that the complaint states a cause of action for negligent killing at a public highway crossing, we should feel obliged to give it serious consideration. But no such contention is advanced, and it would be manifestly unjust to the plaintiff for this court to force upon her a cause of action to which she makes no claim, and which she could probably not prove. And the allegation that Lynch was a licensee seems to negative the idea that he was on the crossing. But our embarrassment is not thereby removed, because plaintiff's counsel contend in their brief that it was the duty of the railway company's servants to sound the whistle and ring the bell at the crossing. If Lynch was not on the crossing when struck, the neglect to give signals of warning at the crossing 200 feet away was not a breach of any duty the company owed him in the place where he was. *Toomey v. Railway Co.*, 86 Cal. 374, 24 Pac. 1074, 10 L. R. A. 139; *Morgan v. Railway Co.*, 159 Mo. 262, 60 S. W. 195-200; *Elwood v. Railroad Co.*, 4 Hun. (N. Y.) 808; *Thompson on Negligence*, § 1707. But, despite the position of counsel, it seems to us that the most definite allegations in the complaint, if we may be allowed the expression, have a greater tendency to locate Lynch at the crossing than elsewhere. But, again, this position seems untenable because of the allegation in paragraph 6 that the crossing therein referred to was 200 feet north of the point where the injury took place. Paragraph 9 of the complaint speaks for itself, and we, therefore, refrain from comment upon it. Paragraph 10 is an allegation of duty on the part of the railway. One averment is that "it was the duty of the railway company to refrain from wantonly killing any human being on its track, and in order to observe said duty, it would be necessary * * * to blow its whistle or ring its bell in approaching said steam."

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There is no allegation that the company did not observe this duty, or that Lynch was in a place where an observance of the duty would have enabled him to avoid the injury.

We find no causal connection between any of the acts complained of and the result to Lynch, and are unable to determine what was the proximate cause of his death. Not only that, but if we may assume, which we may not, that Lynch was killed while in the steam, he appears to have voluntarily gone into a place of known danger, and the allegation that he acted with due care does not relieve the plaintiff, when she assumes to state all the surrounding facts and circumstances, from the necessity of also showing the exact place of the accident, to the end that the court may judge whether or not his negligence contributed to the result. On the face of the complaint the deceased appears to have been guilty of gross negligence, and whether or not such negligence on his part was a proximate cause of his death depends primarily upon the location of the place where he was at the time; and the accountability of the defendants also depends upon that, because, if they owed him any duty at all, the nature of such duty would vary, dependent upon the place of the accident.

The judgment appealed from is affirmed.

Affirmed.

BRANTLEY, C. J., and HOLLOWAY, J., concur.

LOUISVILLE & N. R. Co. *v.* DICK.

(Supreme Court of Mississippi, Feb. 22, 1909.)

[48 So. Rep. 401.]

Railroads—Accidents at Crossings—Liability.—The liability of a railroad company under the statute (Code 1906, § 4043), making it liable for any injury sustained by any one from trains when running through towns at more than six miles an hour, depends on the lawfulness of the speed at the time the danger is discovered, or should have been discovered if the train had been running at the prescribed speed; and a railroad company is liable for injuries to a traveler where at the time the danger was discovered the train was running at an unlawful speed, though at the time of the collision it was running at a lawful speed.

Appeal from Circuit Court, Jackson County; W. H. Hardy, Judge.

Action by F. M. Dick against the Louisville & Nashville Railroad Company for injuries received by plaintiff by being struck by a locomotive while driving across a public crossing within the corporate limits of the town of Ocean Springs. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Gregory L. Smith, for appellant.

Denny & Denny and *Witherspoon & Witherspoon*, for appellee.

MAYES, J. The giving of the fifth instruction in this case was error, for which this case will have to be reversed. The instruction makes the railroad company liable for all injuries sustained by the running of a train through the corporate limits of any city if the locomotive shall have run at a greater rate of speed than six miles at any time whilst in the limits of the city. In other words, if a city be a mile long, and a train approaching the city come in at a rate of speed greater than six miles an hour for the first half mile, and for the second half mile slow down to a lawful rate of speed, and while so running at a less rate of speed than six miles an hour, a person is injured by the train, the railroad company is to be held liable for the injury, just as though they had run the entire mile at a greater rate of speed than six miles per hour. This is not the statute. The statute (Code 1906, § 4043) provides that the company shall be liable for any damage or injury which may be sustained by the loco-

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motive or cars whilst running at a greater speed than six miles. The object of this statute is to have the speed of the train reduced so as to bring the train under perfect control. In the case of Railroad Company v. Toulme, 59 Miss. 284, this court held that, even though the train be running at a less rate of speed than six miles per hour at the very time of the impact, still the company is liable if it appear that at the time the danger was discovered the train was going at an unlawful rate of speed. In the Toulme Case, *supra*, it is plain to be seen that it was the unlawful rate of speed that caused the injury. In the case of Mississippi Central Railroad Co. v. Butler, 46 South. 558, this court held that where a train ran through a town at an unlawful rate of speed, and struck an animal just outside the corporate limits of the town, the statute did not apply because the injury must be occasioned whilst maintaining the unlawful rate of speed. The whole purpose of the instruction is to make the railroad company liable, whether the injury is inflicted whilst maintaining the unlawful speed or not, if the train has been run at a greater rate of speed than six miles per hour while passing through the corporate limits. If the statute can be so applied, it might just as well be applied to a case where it is shown that the train ran through any town along its route at an unlawful rate of speed. Under this construction of the statute, if at any time during its journey any train had been run at a greater rate of speed than six miles an hour in any municipality along its route, the company would be liable.

The question of liability by this statute is made to depend on the lawfulness of the speed at the time the danger is discovered, or should have been discovered if the train had been running at the prescribed speed.

Reversed and remanded.

NEW YORK CENT. & H. R. R. Co. *et al.* v. MAIDMENT.

(Circuit Court of Appeals, Third Circuit, March 12, 1909.)

[168 Fed. Rep. 21.]

Railroads—Accidents at Crossings—Care Required of Automobile Driver—Duty to Stop, Look, and Listen.*—Because of the fact that a collision between a railroad train and an automobile endangers, not only those in the automobile, but also those on board the train, and also because the car is more readily controlled than a horse vehicle, and can be left by the driver, if necessary, the law exacts from him a strict performance of the duty to stop, look, and listen before driving upon a railroad crossing, where the view is obstructed, and to do so at a time and place where stopping and looking and listening will be effective.

Railroads—Accidents at Crossing—Contributory Negligence.—An automobile driven by plaintiff, in which he was riding with a friend, was struck by a train at a railroad crossing, and he was injured. There were double tracks, and plaintiff stopped 20 feet from the nearest track to allow a train on such track to pass, and then started ahead and was struck by a train on the other track going in the opposite direction. From the place where he stopped the tracks could be seen for a considerable distance in the direction from which the first train came; but, owing to trees and other obstructions, he could not see more than 175 feet in the other direction. If he had stopped on the first track, he could have seen the approaching train when 700 feet away; but he did not stop. Held, that he took chances rather than precaution, and was chargeable with contributory negligence, which precluded a recovery for his injury from the railroad company.

In Error to the Circuit Court of the United States for the District of New Jersey.

*For the authorities in this series on the subject of the care required of a highway traveler to discover approaching trains or street cars before attempting to cross railroad tracks as affected by the fact that the view of the track is obstructed at such crossing, see second paragraph of second foot-note of *Denver City, etc., Co. v. Cobb* (C. C. A.), 31 R. R. R. 188, 54 Am. & Eng. R. Cas., N. S., 188, where all those preceding it are collected; *Davis v. Chicago, etc., Ry. Co.* (C. C. A.), 30 R. R. R. 183, 53 Am. & Eng. R. Cas., N. S., 183; *Kuntz v. Oregon R. Co.* (Ore.), 29 R. R. R. 721, 52 Am. & Eng. R. Cas., N. S., 721.

For the authorities in this series on the subject of the duty of a highway traveler to look again for trains or cars, just before he attempts to cross railroad tracks, see second foot-note of *Denver City, etc., Co. v. Cobb* (C. C. A.), 31 R. R. R. 188, 54 Am. & Eng. R. Cas., N. S., 188, where all those preceding it are collected; *Cherry v. Louisiana & A. Ry. Co.* (La.), 30 R. R. R. 746, 53 Am. & Eng. R. Cas., N. S., 746; *Boyd v. St. Louis S. W. Ry. Co.* (Tex.), 29 R. R. R. 742, 52 Am. & Eng. R. Cas., N. S., 742.

New York Cent. & H. R. R. Co. v. Maidment

James B. Vredenburg and Albert C. Wall, for plaintiffs in error.

John S. Mackay, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Maidment, hereafter styled plaintiff, sued the railroads, hereafter styled defendants, for damages sustained by him in a collision between an automobile, driven by him, and defendants' passenger train. The plaintiff recovered a verdict, and to review the judgment entered thereon defendants sued out this writ. A number of errors are alleged, but in our view the case turns on the refusal to give binding instructions for the defendants. If the plaintiff was guilty of contributory negligence, the point was well taken. To that question we therefore address ourselves.

At 7:21 on the evening of August 17, 1906, plaintiff drove his steam automobile westwardly on the Ft. Lee road to a point where the highway crossed at right angles the double-track main line of the defendants. A friend, Herrick by name, occupied the seat beside him. He states in his declaration it—"was an extraordinarily dangerous crossing, for the public using the highway known as the Ft. Lee road, in that the approach of locomotives and cars of the defendants is obscured by a bridge, woods, trees, foliage, buildings, poles, and other obstructions, and the tracks of the defendants, at the time aforesaid, were constructed in a curved line, preventing a clear view of the defendants' locomotives and cars, moving in either direction towards the crossing aforesaid, which bridges, woods, trees, foliage, buildings, poles, and curved track obscured the view of persons crossing or attempting to cross the tracks of the defendants at the place aforesaid, in the borough aforesaid, on the 17th day of August, 1906."

He was familiar with the place, from crossing it that morning and several times before. A watchman was located there, but had left before plaintiff approached. At a point 15 or 20 feet back from the east-bound track, plaintiff stopped his machine to await the passage of a long freight train on the nearest, or east-bound, track. He waited until the freight was 180 feet beyond the crossing, when he started his automobile down the sharp decline to the east-bound track and attempted to dart across the double tracks. At that instant a passenger train coming westward on the other, or west-bound, track, struck and wrecked his automobile and seriously injured the plaintiff. Was he guilty of contributory negligence in making the crossing?

With the coming into use of the automobile, new questions as to reciprocal rights and duties of the public and that vehicle have and will continue to arise. At no place are those relations more important than at the grade crossings of railroads. The

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main consideration hitherto with reference to such crossings has been the danger to those crossing. A ponderous, swiftly moving locomotive, followed by a heavy train, is subjected to slight danger by a crossing foot passenger, or a span of horses and a vehicle; but when the passing vehicle is a ponderous steel structure, it threatens, not only the safety of its own occupants, but also those on the colliding train. And when to the perfect control of such a machine is added the factor of high speed, the temptation to dash over a track at terrific speed makes the automobile, unless carefully controlled, a new and grave element of crossing danger. On the other hand, when properly controlled, this powerful machine possesses capabilities contributing to safety. When a driver of horses attempts to make a crossing and is suddenly confronted by a train, difficulties face him to which the automobile is not subject. He cannot drive close to the track, or stop there, without risk of his horse frightening, shying, or overturning his vehicle. He cannot well leave his horse standing, and if he goes forward to the track to get an unobstructed view and look for coming trains he might have to lead his horse or team with him. These precautions the automobile driver can take, carefully and deliberately, and without the nervousness communicated by a frightened horse. It will thus be seen an automobile driver has the opportunity, if the situation is one of uncertainty, to settle that uncertainty on the side of safety, with less inconvenience, no danger, and more surely than the driver of a horse. Such being the case, the law, both from the standpoint of his own safety and the menace his machine is to the safety of others, should, in meeting these new conditions, rigidly hold the automobile driver to such reasonable care and precaution as go to his own safety and that of the traveling public. If the law demands such care, and those crossing make such care, and not chance, their protection, the possibilities of automobile crossing accidents will be minimized. In the case of trolleys crossing railroads at grade, the practice is general for the conductor to go ahead and from the track signal the halted car to advance. This would, of course, be impracticable as a rule for automobiles; but it illustrates the trend of the law, as the size of crossing vehicles makes collision with them more serious, to enforce greater safety precautions.

Now, in the present case, we are clear the plaintiff, in crossing with his automobile, unfortunately wholly omitted to take those reasonable precautions which the situation both demanded and permitted. It is true he stopped 15 or 20 feet back from the tracks; but this was not to get a view of approaching trains. As will be seen later, he could not from that point get a sufficient outlook, and his stop there was merely to await the passage of the freight train. He says:

"I was between 15 and 20 feet, about 20 feet, and I couldn't

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go any further there, because farther on the roadway runs right down to a track on a steep grade like that (illustrating), quite a perceptible grade, and, of course, I did not want to take any chances of having the machine get away from my control and slip into the freight train. So that was the reason I stopped there."

From where he stopped it was impossible to see up the track, in the direction the west-bound trains would come from, further than 180 feet. Trees and bushes on the property adjoining defendants' right of way cut off all sight of the track beyond that short distance. He could see in the other direction a long way, and knew that no train was following the freight. Moreover, by stopping the automobile on the track which the freight had just passed over, he could see the east-bound track for upwards of 700 feet. Thus plaintiff's witness Herrick, who was in the machine, in answer to the question, "If you had looked north-erly after your machine had gotten on the easterly track, could you or could you not have seen the approaching passenger train on the westerly track?" answered, "Well, it seems as though we could see it; yes." It will thus be seen that when the plaintiff made his only stop he had no sufficient view of the track on which west-bound trains came, and that he made no stop on the east-bound track from which he could have seen a train coming on the west-bound one. This was negligence, a lack of precaution and reasonable care, which would have prevented the accident. As it was, the plaintiff says that after the train flashed down upon him he brought his machine "to a complete stop and just to the point of reversing; if it would have been half a second later I would have avoided it." Indeed, the whole proof shows the plaintiff took chances, instead of precautions. We have seen he had no sufficient view when he first stopped. His view became worse as he went down the steep declivity to the track; for at that point Mr. Williams, an engineer and surveyor called by plaintiff, testified, "a pole and a sign pole and an automatic signal all came together," and cut off the vision to less than 175 feet.

But the plaintiff was not without means of crossing in safety. A second man was in the automobile. He could have gone ahead to the east-bound track, or Maidment could have safely halted the machine there. Instead of doing this, and without sight of the west-bound track, save for the very short distance a swift train would quickly cover, he took the chance of dashing across. He says:

"I took hold of the throttle to make this crossing as rapidly as I could to get out of the way quickly, and after I had started, and had gone I don't know how far, a train flashed down on me; and instantly I put my foot on the brake, throwing back my throttle at the same time, and making every effort to avoid any possible collision. * * * The machine had come to a

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complete stop, and just on the point of reversing. If it had been half a second later, I would have avoided it."

The duty of an automobile driver approaching tracks where there is restricted vision to stop, look, and listen, and to do so at a time and place where stopping and where looking and where listening will be effective, is a positive duty, and these safeguarding steps the plaintiff failed to take. He stopped where stopping served no purpose, and failed to stop where stopping would have disclosed danger. He made chance, and not sight, the guarantee of his safety.

We are clear he was guilty of contributory negligence, and the judgment below should be reversed.

RUNDGREN v. BOSTON & N. ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Middlesex, Feb. 25, 1909.)

[87 N. E. Rep. 189.]

Street Railroads—Personal Injuries—Contributory Negligence.*—

Where a person, injured after alighting from a street car by being struck by a car going in the opposite direction, looked before he stepped upon the track, saw the approaching car, and yet went across, he was not entitled, in an action for the injuries received, to go to the jury on his right to rely, and his reliance in fact, on a sign on a pole directing the motormen to "Go slowly," and on defendant's practice in causing other cars to slow down or stop under circumstances like those in the case at bar.

Street Railroads—Personal Injuries—Contributory Negligence—Sudden Peril.†—Plaintiff, in an action for injuries received by being struck by a street car, could not invoke the doctrine of sudden peril to extricate himself from a position into which he had come through

*For the authorities in this series on the question whether a person injured through the act of another had the right to assume that the latter had performed or would perform the duties owing to the person injured, or whether it was the duty of the injured person to anticipate negligence on the other's part, see foot-note of *Tognazzi v. Milford, etc., Ry. Co. (Mass.)*, 31 R. R. R. 530, 54 Am. & Eng. R. Cas., N. S., 530; first foot-note of *Schwanenfeldt v. Chicago, etc., Ry. Co. (Neb.)*, 29 R. R. R. 238, 52 Am. & Eng. R. Cas., N. S., 238.

For the authorities in this series on the subject of the right to cross street railway tracks in front of a car which is seen approaching, see second paragraph of the second foot-note of *Deutsch v. Trans. St. Mary's Traction Co. (Mich.)*, 31 R. R. R. 133, 54 Am. & Eng. R. Cas., N. S., 133; first head-note of *Carrahan v. Boston & N. St. Ry. Co. (Mass.)*, 30 R. R. R. 750, 53 Am. & Eng. R. Cas., N. S., 750; *Adam v. Union Elec. Co. (Iowa)*, 30 R. R. R. 218, 53 Am. & Eng. R. Cas., N. S., 218; second foot-note of *Riedel v. Wheeling Traction Co. (W. Va.)*, 29 R. R. R. 768, 52 Am. & Eng. R. Cas., N. S., 768.

†See second foot-note of *McFeat v. Philadelphia, etc., R. Co. (Del.)*, 50 R. R. R. 254, 53 Am. & Eng. R. Cas., N. S., 254; first foot-note of *Davis v. Chicago, etc., Ry. Co. (C. C. A.)*, 30 R. R. R. 183, 53 Am. & Eng. R. Cas., N. S., 183; last foot-note of *Smith's Adm'r v. Norfolk & W. Ry. Co. (Va.)*, 29 R. R. R. 715, 52 Am. & Eng. R. Cas., N. S., 715.

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his own negligence in walking so fast that he could not stop when he saw a car approaching, and especially so where it was shown that there was no necessity for his hurry.

Exceptions from Superior Court, Middlesex County; Wm. B. Stevens, Judge.

Action by Arthur F. Rundgren against the Boston & Northern Street Railway Company. From a judgment on a directed verdict for defendant, plaintiff brings exceptions. Exceptions overruled.

Tort for personal injuries. Plaintiff was a passenger on one of defendant's cars and was going to his work in the Navy Yard at Charlestown. When the car reached the place where plaintiff wished to leave it, he alighted hastily, ran behind the car and in crossing the parallel track was hit by a car coming in an opposite direction. The place where plaintiff alighted was a street crossing, and there was a sign on a pole, put there by the railway company, directing motormen to "Go slowly." There was evidence that the car which hit plaintiff was going at a rate of speed which plaintiff contended was negligent.

Cornelius A. Parker and Theodore Von Rosenvinge, for plaintiff.

Endicott P. Saltonstall, for defendant.

LORING, J. We are of opinion that as matter of law the plaintiff was guilty of negligence which contributed to the injury, and for that reason the judge was right in directing a verdict for the defendant. The case comes within *Madden v. Boston Elevated Ry.*, 194 Mass. 491, 80 N. E. 447; and cases there cited. See, also, *Holian v. Boston Elevated Ry.*, 194 Mass. 74, 80 N. E. 1, 11 L. R. A. (N. S.) 166; *Fitzgerald v. Boston Elevated Ry. Co.*, 194 Mass. 242, 80 N. E. 224; *Beirne v. Lawrence & Methuen St. Ry.*, 197 Mass. 173, 83 N. E. 359.

The plaintiff had no right to go to the jury on his right to rely and his reliance in fact on the sign "Go slowly," and on the practice of the defendant in causing the other cars to slow down or stop under circumstances like those in the case at bar. He looked before he stepped upon the track, saw the car and yet went across. See *Casey v. Boston Elevated Ry.*, 197 Mass. 440, 83 N. E. 867.

Neither can the plaintiff invoke the doctrine of one put in sudden peril. If he was walking so fast that he could not stop when he saw the car, that was in itself negligence. A plaintiff cannot invoke the doctrine of sudden peril to extricate himself from the position into which he has come through his own negligence. He testified that being too late for the 7:30 gang of workmen he could not go to work until 8:30, and that having 55 minutes to spare he was in no hurry.

Exceptions overruled.

TEXAS & P. RY. CO. *v.* CRUMP *et al.*

(Supreme Court of Texas, Jan. 13, 1909.)

[115 S. W. Rep. 26.]

Evidence—Conclusion of Witness—Custom and Habit*—On the issue whether the engine bell was ringing when plaintiff's intestate was struck, it was competent for the engineer to testify that the bell was ringing, relying on his habit of ringing the bell to sustain him in that conclusion.

Negligence—Contributory Negligence—Children.†—The care required of a child 10 years of age is the care which a person of his age and condition would use under similar circumstances.

Continuance—Surprise at Trial.—A party who learns that a witness will not testify as supposed, must, to obtain a continuance, promptly apply for the withdrawal of his announcement of ready for trial, and he cannot wait until the adverse party has virtually developed his case before applying for a continuance.

New Trial—Grounds—Newly Discovered Evidence—Diligence.—An application for a new trial on the ground of newly discovered evidence did not show that an agent of the party had not acquired information as to what the new witness would testify to before the trial began. The agent was in attendance on the court, and was a witness. The new witness refused to make an affidavit to accompany the application, and no reason was shown why he was not placed on the stand to testify on the hearing. Counter affidavits showed that the agent had had a conversation with the new witness about the case prior to the trial. Held, that the application was properly denied.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Booker Crump and another against the Texas & Pacific Railway Company. There was a judgment of the Court of Civil Appeals (110 S. W. 1013) affirming a judgment for plaintiffs, and defendant brings error. Reversed and remanded.

*See second foot-note of *Bandekow v. Chicago, etc., Ry. Co.* (Wis.), 31 R. R. R. 159, 54 Am. & Eng. R. Cas., N. S., 159; third foot-note of *Tinkle v. St. Louis, etc., R. Co.* (Mo.), 30 R. R. R. 470, 53 Am. & Eng. R. Cas., N. S., 470.

†See second foot-note of *Cahill v. E. B. & A. L. Stone & Co.* (Cal.), 29 R. R. R. 762, 52 Am. & Eng. R. Cas., N. S., 762; second paragraph of first foot-note of *Birmingham, etc., Co. v. Landrum* (Ala.), 28 R. R. R. 593, 51 Am. & Eng. R. Cas., N. S., 593; tenth head-note of *Gesas v. Oregon Short Line R. Co.* (Utah), 28 R. R. R. 305, 51 Am. & Eng. R. Cas., N. S., 305; second head-note of *Simkoff v. Lehigh Valley R. Co.* (N. Y.), 27 R. R. R. 484, 50 Am. & Eng. R. Cas., N. S., 484; second foot-note of *Gehring v. Atlantic City R. Co.* (N. J.), 27 R. R. R. 575, 50 Am. & Eng. R. Cas., N. S., 575.

Texas & P. Ry. Co. v. Crump

W. L. Hall and T. B. McCormick, for plaintiff in error.

P. A. Sidell, Curtis Hancock, and Cockrell & Gray, for defendants in error.

BROWN, J. Booker Crump and his wife, Addie, sued the plaintiff in error to recover damages for the death of their son, Allen, aged about 10 years. They alleged that on the 12th day of September, 1905, Allen Crump was walking westward on the track of the Texas & Pacific Railroad in the city of Dallas and along Pacific avenue, and that the said track was used as a public highway for people in passing through the city in that direction. It was charged that a passenger train on the said track going west, and behind the said Allen Crump, was running at a high rate of speed, in excess of seven miles an hour, which was the limit fixed by an ordinance of the said city; that there was no bell ringing nor whistle blowing at the time.

The following ordinances were in effect in the said city at the time this accident occurred:

"Art. 423. That it shall not be lawful to conduct, run or cause to be run, within the limits of this city any railway engine or car at a speed greater than seven miles an hour.

"Art. 424. That it shall not be lawful to conduct, run or cause to be run, any railway engine or locomotive, within the limits of this city, without ringing a bell attached thereto, before starting, and all the time said engine or locomotive may be in motion.

"Art. 427. Any person who shall violate or fail to comply with the provisions of the foregoing articles shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than three nor more than one hundred dollars."

The defendant pleaded a general denial and contributory negligence. The Honorable Court of Civil Appeals did not make a finding of fact in this case, and we state the facts briefly as follows: On the 12th day of September, 1905, Allen Crump, a son of the defendants in error, being about 10 years old, was walking on the track of the Texas & Pacific Railroad on Pacific avenue in Dallas going westward. There was no evidence that he looked for a train, or took any precaution to discover an approaching train. A passenger train upon the same track going westward was moving in the rear of Allen Crump, no bell was being rung nor whistle blown at the time, and the train was running at a speed exceeding seven miles. The train struck the boy, and run over him, cutting off one of his arms, from which he died that night. The trial was by jury, and verdict rendered for the plaintiffs, and judgment was entered in accordance with the verdict, which was affirmed by the Court of Civil Appeals.

One of the issues in the case was whether or not the bell was being rung on the engine at and before the time the boy was struck. The defendant placed upon the stand R. R. Ramsey, who was

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the engineer on the train that ran over the boy. He testified that he did not remember about that particular night; that there was nothing to fix it on his mind. He was asked the question, "Do you know whether or not your bell was ringing that night?" to which he answered, "Yes, sir; it is always ringing." Upon objection of the plaintiffs the answer was excluded from the jury, but the ground of the objection is not stated. The defendant excepted to the ruling of the court in excluding the answer. The testimony should have been admitted. It was competent for the witness to state that the bell was ringing, relying upon his habit of ringing it to sustain him in that conclusion. The weight of the testimony was for the jury, and it was not proper for the court to exclude it. *Davie v. Terrill*, 63 Tex. 107. In the case cited the witness was an attorney called to give an account of a certain paper which had been in his possession. He stated, in substance, that he had mailed it to his associate counsel, but he did not remember the fact of mailing it. He stated his habit of correspondence and the manner of conducting his business as grounds for his conclusion. The trial court excluded the evidence from the jury, of which ruling this court said: "Whilst all these circumstances taken together satisfied the witness that he had forwarded the writ, they might not have satisfied the jury. Still the court could hardly say that the witness, acquainted as he was with his own habits of business, was wholly unwarranted in concluding that he had sent the order of sale to Denton county. We think that in such cases the testimony should be received, and the jury allowed to draw their own conclusions, and the court erred in excluding such evidence in the present instance." The testimony of the witness Robbins was of the same character which need not be detailed here, and was excluded by the court without any statement of the ground of its action. We are of opinion that the court erred in excluding the testimony of the two witnesses, and for that error the judgment must be reversed.

The trial judge charged the jury as follows: "Ordinary care as herein used means that care which a person of his age and condition would have used under similar circumstances." Error is assigned upon this charge, but we think that it is substantially correct, and therefore overrule that assignment. *T. & P. R. R. Co. v. Phillips*, 91 Tex. 278, 42 S. W. 852.

When the case was called for trial there was an order that the witnesses be placed under the rule. The attorneys for the railroad company had a conversation with Tommie York, their witness, and learned from him then that he would not testify as they had been informed he would. The trial proceeded, and the plaintiff introduced a number of witnesses, when the court adjourned for noon. When the court resumed business in the afternoon, the attorneys for defendant moved the court for permission to withdraw the announcement of ready for trial and to continue the

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case, because they had been deceived by Tommie York as to what his testimony would be. The motion was overruled. Error is assigned upon the action of the court in refusing to permit them to withdraw the announcement and continue the case. The application to withdraw the announcement should have been promptly made when the attorneys learned that the witness had changed his evidence. The court properly refused to allow the defendant to enter upon the trial and wait until the plaintiffs had virtually developed their case before making the application to continue. There was no error in the ruling of the court upon that motion.

The plaintiffs in error made a motion in the district court for a new trial on the ground of newly discovered evidence, stating, in substance, that since the trial the attorneys had learned that David Davis, who lived in the city of Dallas, was the driver of the ambulance which took Allen Crump to the hospital, and that he would testify as to certain declarations made by Allen Crump. This application was supported by the affidavit of one of the claim agents of the railroad company. Counter affidavits were filed showing that one Lewis, the claim agent of the railroad company, who was investigating this case, and who talked to Tommie York, also had a conversation with Davis about the case. Lewis was in attendance upon the court, and was introduced as a witness in this case. The application did not show that Lewis had not acquired information as to what Davis would testify to before the trial began. Davis was in the employ of the city and resided in the city, and there is no reason shown why they could not have placed him on the stand to testify on this motion; Davis having refused to make an affidavit to accompany the motion. There was no error in overruling the motion for new trial.

It is ordered that the judgments be reversed and the cause remanded.

BAKER v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina, May 5, 1909.)

[64 S. E. Rep. 506.]

Railroads—Death of Infant Licensee on Work Train—Contributory Negligence.—Where a boy of 14 was permitted to ride on the rear flat car of a work train, and, while it was running at 30 miles an hour, suddenly and voluntarily jumped off and was killed, he was guilty of contributory negligence barring recovery for his death if he can be held responsible in law for his conduct.

Railroads—Death in Jumping from Train—Responsibility of Infant Licensee.*—The responsibility of a boy of 14 killed in jumping from a rapidly moving train on which he was allowed to ride is not to be judged by the length of his experience with railroads.

Negligence—Contributory Negligence—Presumption as to Infant's Capacity.—An infant of 14 is presumed to have sufficient capacity to be sensible of danger and power to avoid it, and this presumption stands till rebutted by clear proof of absence of the discretion usual to that age.

Negligence—Contributory Negligence—Commencement of Infant's Responsibility—Question of Law or Fact.—At what age an infant is presumed to have sufficient capacity to be sensible of danger and power to avoid it is not a question of fact, but of law, and the inquiry as to at what age his responsibility for negligence must be presumed to commence cannot be referred to the jury.

Negligence—Contributory Negligence—Care and Prudence Required of Infants.*—An infant is held to the care and prudence usual among children of the same age, and if directly injured by his own act, while negligence of another is only such as to expose him to possibility of injury, he cannot recover.

Negligence—Contributory Negligence—Discretion of Infant—Weight of Rebuttal Evidence—Question for Jury.—The weight of evidence to rebut the presumption of discreet judgment of an infant over 14 years of age is for the jury.

Railroads—Death of Infant Licensee—Motive in Jumping from Train—Materiality.—In determining liability for the death of a boy who recklessly jumped from a rapidly moving train on which he was permitted to ride, his motive in so doing is immaterial.

Appeal from Superior Court, Anson County; Long, Judge.

Action by C. A. Baker, administrator of Carl Baker, deceased, against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. Reversed.

John D. Shaw and Murray Allen, for appellant.

Robinson & Caudle and L. Medlin, for appellee.

*See second foot-note of preceding case.

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BROWN, J. The defendant in apt time entered motions to nonsuit upon the ground that upon plaintiff's own evidence he is not entitled to recover: (1) Because no negligence is shown; (2) because the intestate was guilty of contributory negligence. We are all of opinion that this last contention is so plainly with the defendant that it is unnecessary to consider the first.

These facts appear from plaintiff's evidence: His son, Carl, 15 years of age lacking one month, was killed by jumping from defendant's work train while running about 30 miles an hour. The train consisted of flat cars, equipped with machinery for ditching. Witness for plaintiff, who testify concerning the occurrence, say that on the afternoon of August 15, 1906, the boy Carl and his younger brother, Luther Baker, came up to the train from their home, about three-quarters of a mile away. When they arrived at the train, Herman Shannon, another boy, was standing on a flat car. Carl Baker asked the conductor if he could ride, and the conductor told him to get on the rear end of the train on a flat car out of the way. Carl then climbed up on the flat car and pulled his younger brother up with him. The train continued the work of ditching. The boys remained on the car an hour. It became necessary for the train to take a siding to let another train pass going towards Monroe. After this train passed, the ditching train pulled out for Waxhaw, two miles away. When the train had gotten up good speed and was running at rate of about 30 miles an hour, Carl Baker got up from where he was sitting on a scantling and sat down on the rear of the flat car and jumped off between the rails. Herman Shannon, who was on the car with plaintiff's intestate, testified that he remained on the train in the position occupied by himself and Carl Baker until it reached Waxhaw, without injury to himself. This witness was nearly a year younger than Carl Baker. According to the testimony of the plaintiff, his son Carl was an "intelligent, smart boy, and of average size for his age," and for two years had been residing within three-quarters of a mile from the railroad.

It is settled beyond controversy by the decisions of this and all other courts in this country that the act of the intestate in jumping off the rapidly moving train of defendant was one of such recklessness as will bar recovery, if the intestate is held in law responsible for his conduct. *Owens v. Railroad*, 147 N. C. 357, 61 S. E. 198; *Morrow v. Railroad*, 134 N. C. 92, 46 S. E. 12. The learned counsel for plaintiff, Mr. Caudle, in an able and elaborate argument, endeavored to show that the intestate, on account of his age, should not be held responsible for his act; but an examination of the authorities in this and other states discloses that they are overwhelmingly against him. The case is not to be judged by the length of experience of the boy Carl with railroads, although the evidence discloses that for two years he had resided

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near one, and that his 12 year old brother, Luther, is by no means a stranger to them. Carl wore long trousers, was well grown, bright, smart, and intelligent. He was not an infant of tender years, and, in the absence of evidence to the contrary, had the capacity of an adult to appreciate danger. He was three years beyond the age at which he could be employed in a factory, around dangerous machinery, without violating the child labor law, and was old enough to be held responsible for a violation of the criminal law of the land.

An infant of the age of 14 years is presumed to have sufficient capacity to be sensible of danger and to have power to avoid it, and this presumption will stand until rebutted by clear proof of the absence of such discretion as is usual with infants of that age. At what age this presumption arises is not a question of fact, but one of law. The inquiry at what age must an infant's responsibility for negligence be presumed to commence cannot be answered by referring it to a jury. That would furnish us with no rule whatever. It would simply produce a shifting standard, according to the sympathies or prejudices of those who compose each particular jury. One jury might fix the age at 14, and another at 18, and another at 20. The responsibilities of infants are clearly defined by text-writers and courts. At common law 14 was the age of discretion in males and 12 in females. At 14 an infant could choose a guardian and contract a valid marriage. After 7 an infant may commit a felony, although there is a presumption in his favor, which may, however, be rebutted; but after 14 an infant is held to the same responsibility for crime as an adult. Sharswood's Blackstone, vol. 1, pp. 20, 435, 404. Inasmuch as an infant, after 14, may select a guardian, contract marriage, is capable of harboring malice and of committing murder, it is no great imposition on him to hold him responsible for his own negligence. In the Case of *Tucker v. Railroad*, 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670, the Court of Appeals of New York says: "The question at what age an infant's responsibility for negligence may be presumed to commence is not one of fact, but of law. In the absence of evidence tending to show that a boy 12 years of age was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track an adult would, he must be deemed *sui juris* and chargeable with the same measure of caution as an adult." To same effect is *Nagle v. Railroad*, 88 Pa. 35, 32 Am. St. Rep. 413. That infants are to be held for the consequences of their own negligence in actions for injuries to them has long been settled by this and other courts and so declared by text-writers. *Shearman & Red. Neg.* § 49; *Wharton on Neg.* 314; *Manly v. Railroad*, 74 N. C. 655; *Murray v. Railroad*, 93 N. C. 94; *Railroad v. Gladmon*, 15 Wall. 401, 21 L. Ed. 114; *Railroad v. Stout*, 17 Wall. 657, 21 L. Ed. 745. From all these and other

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approved authorities the principle is deduced that an infant, so far as he is personally concerned, is held to such care and prudence as is usual among children of the same age, and if his own act directly brings the injury upon him, while the negligence of the defendant is only such as exposes the infant to the possibility of an injury, the latter cannot recover.

The Supreme Court of the United States has substantially held the same to be sound law in the cases above cited.

We find in the books many cases where children of various ages from seven years upwards have been denied a recovery because of their own negligence. *Boland v. Railroad*, 36 Mo. 484; *Meeks v. Railroad*, 52 Cal. 605; *Cauley v. Railroad*, 4 Am. & Eng. R. R. Cas. 533; *Mathis v. Mfg. Co.*, 140 N. C. 530, 53 S. E. 349; *Murray v. Railroad*, *supra*; *Beck v. Railroad*, 148 N. C. —, 62 S. E. 883. In *Meredith v. Railroad*, 108 N. C. 616, 13 S. E. 137, the plaintiff, a bright boy about 13 years old, while passing along the highway, was struck and injured by an engine while attempting to avoid another coming from the opposite direction. The court held that his administrator was not entitled to recover for his death. Judge Avery says: "The witnesses concur in the statement that the boy who was injured was an intelligent youth about 13 years old. In the absence of knowledge or information to the contrary, the engineer was justified in supposing that he would look to his own safety, even when trains were moving on three parallel tracks, if there was manifestly an opportunity to escape by walking across the railway to a neighboring side track." Again, he says: "The boy injured was described by witnesses as being bright and 'smart,' but, if he was apparently capable of appreciating his peril or his situation, it is sufficient to relieve the servants of the company from the imputation of carelessness in assuming that he would step aside before the engine reached him.

This principle has been applied in other states regardless of whether the child was over the age of 14 years. In *Dull v. Railroad*, 21 Ind. App. 571, 52 N. E. 1013, it is held that a child 11 years old and of sufficient intelligence to know the difference between safety and danger is a person *sui juris* so as to be charged with contributory negligence resulting in his being struck by a train. "A boy 11 years of age knows as well as an adult does what a railroad is and the use to which it is put and the consequence to a person who should be struck by a passing train, and knows that he should not stop to play and lounge amid a network of tracks. It is true that a boy of that age cannot be presumed to have the judgment of an adult, but it does not require much judgment to keep from walking in dangerous places, the dangers of which are fully understood." *Masser v. Railroad*, 68 Iowa, 602, 27 N. W. 776. Also, *Powers v. Railroad*, 57 Minn. 322, 59 N. W. 307. In *Mendenhall v. Railroad*, 66 Kan.

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438, 71 Pac. 846, 61 L. R. A. 120, 97 Am. St. Rep. 380, a 15 year old boy paid a brakeman on a passenger train 25 cents to permit him to ride on the train. The brakeman told him to get on the platform of the baggage car and to get off at stopping places and keep out of sight. The plaintiff rode upon the platform to a nearby station and in getting off the train while in motion on the opposite side from the depot stumbled over a semaphore board, fell under the train, and received the injury complained of. The demurrer to the complaint was sustained. The court says: "That he was a trespasser not a passenger. The company owed him no duty in regard to the construction of its semaphore, or otherwise, except to avoid willful and wanton negligence. The plaintiff was injured not because he was riding on the platform, but because he got off the train while in motion and on the opposite side of the car from the depot. The allegation is insufficient to show the defendant to have been guilty of any willful or wanton negligence or to relieve the plaintiff from the responsibility of his own wanton recklessness." The Massachusetts court holds that: "A street railway corporation is not liable for an injury caused to a boy 10 years old who was when injured playing with other children upon a car left without guard for several days on a public street of a city." *Gay v. Railway Co.*, 159 Mass. 238, 34 N. E. 186, 21 L. R. A. 448, 38 Am. St. Rep. 415. In *Studer v. Railroad*, 121 Cal. 400, 53 Pac. 942, 66 Am. St. Rep. 39, recovery was denied in an action for death of a child between 12 and 13 years of age who was killed in attempting to pass between the cars of a freight train. The court says: "The fact that deceased was only about 12 years of age did not require the court to submit to the jury whether his attempt to pass between the cars constituted negligence. The law imposes upon minors the duty of giving such attention to their surroundings and care to avoid danger as may reasonably be expected in persons of their age and capacity; and children as well as adults must use discretion which persons of their years ordinarily have, and cannot be permitted with impunity to indulge in conduct which they know or ought to know to be reckless." In *Sheets v. Railway Co.*, 54 N. J. Law, 518, 24 Atl. 483, an intelligent child 13 years old was struck by a street car while crossing a public street. Recovery was denied. The court says: "The trial judge laid down the rule of law with respect to her responsibility with substantial accuracy. She was evidently *sui juris*, and the jury were told to consider the degree of care and discretion which would be expected from her. The jury found by their verdict that she was not guilty of contributory negligence; in other words, she was at the time of the occurrence in the exercise of that degree of care which would reasonably be expected from a child of that age and intelligence."

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years of age must stand until it is overthrown by clear proof of the absence of such natural intelligence as is usual with infants of similar age. If such evidence is offered by the plaintiff to rebut such presumption, its weight and value are for the jury to estimate. In this case the plaintiff does not attempt to rebut such presumption, nor does he offer even a suggestion that the engineer, after he started his train, caused the injury, or could have prevented it. The intestate was sitting on the rear end of the last flat car while it was moving at great speed and suddenly and voluntarily jumped off and was instantly killed. What his motive was in so doing is immaterial. The conclusion is irresistible that had the intestate imitated the wholesome example of his more youthful yet more prudent companion, who sat beside him, and had gone on the short distance to Waxhaw, he would have easily returned to his home in safety.

The motion to nonsuit is allowed. *Hollingsworth v. Skelding*, 142 N. C. 252, 55 S. E. 212.

Reversed.

DAMPF v. YAZOO & M. V. R. Co.

(Supreme Court of Mississippi, Feb. 15, 1909.)

[48 So. Rep. 612.]

Negligence—Care as to Children—Injuries on Turntables—Permission to Play on—Evidence.—In an action for injuries to a child on a railroad turntable, evidence as to permission given to the child to play on the turntable by an employee of the railroad was admissible.

Negligence—Injuries to Children on Turntable—Questions for Jury.—In an action for injuries to a child playing on a railroad turntable, evidence held sufficient to go to the jury on the issues of negligence and contributory negligence.

Appeal from Circuit Court, Wilkinson County; M. H. Wilkinson, Judge.

"To be officially reported."

Action by Jacob Dampf, by his next friend, against the Yazoo & Mississippi Valley Railroad Company. From a judgment for defendant on a direct verdict, plaintiff appeals. Reversed and remanded.

Appellant, a boy between 12 and 13 years of age, was playing with a lot of other small boys around a turntable of the defendant railroad company. The turntable had been left unlocked, being fastened in place only by an iron rod, which seems to have been removed by the boys, who began to turn the turntable around; and while so doing, appellant's foot was caught, and one

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of his toes so crushed that the removal of the bone became necessary. The defendant pleaded the gross negligence of the plaintiff, who had knowledge of the danger, and who had been warned by some one passing by that it was dangerous. On the trial the plaintiff offered testimony tending to show that one Abe Bonney, an employee of the railroad company, who was near the turntable at the time engaged in watching an engine, had given these boys permission to play on the turntable. This evidence was excluded, and a peremptory instruction was given for defendant, and plaintiff appeals.

Shannon & Jones and *E. G. Shannon*, for appellant.

Mayes & Longstreet, for appellee.

WHITFIELD, C. J. The excluded testimony as to Abe Bonney's permission was competent. On the testimony in this record, the case should most manifestly have gone to the jury. The court, therefore, erred in giving a peremptory instruction for the defendant.

Reversed and remanded.

SKIPWORTH *et al.* v. MOBILE & O. R. Co.

(Supreme Court of Mississippi, April 12, 1909.)

[48 So. Rep. 964.]

Railroads—Operation of Trains—Signals at Crossings.*—A railroad company failed to give the statutory signals at a crossing, and its train came suddenly on a team near the track, causing the team to become frightened and unmanageable, resulting in injury to it and to the wagon. Held, that the company was liable for the injuries sustained; a traveler having the right to demand the giving of the signals.

Trial—Issues—Question for Jury.—Where there is a conflict in the evidence, the issue is for the jury.

Appeal from Circuit Court, Lowndes County; R. F. Cochran, Judge.

Action by Jesse Skipworth and another against the Mobile & Ohio Railroad Company. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

Appellant was driving to town in a two-horse wagon. When, according to his witnesses' testimony, he had driven on an em-

*See foot-note of *Illinois Cent. R. Co. v. Armstrong* (Miss.), 31 R. R. R. 199, 54 Am. & Eng. R. Cas., N. S., 199, where all the authorities on the subject in this series, preceding it, are collected.

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bankment of the railroad company and was very close to the track, a train came suddenly upon them, without ringing the bell, or blowing the whistle, or giving any other alarm. His team became unmanageable, and plunged in front of the engine, and one of the horses was killed, the other injured, and the wagon demolished. Appellant was unhurt, and he brings suit to recover for the damages to his wagon and team. Defendant denies that it did not give the proper signals on approaching the crossing, and pleaded contributory negligence on the part of the plaintiff. After the testimony was in the court gave a peremptory instruction for the defendant, and plaintiff appeals.

James T. Harrison, for appellants.

FLETCHER, J. This case in its essential aspects is controlled by the case of *L. & N. R. R. Co. v. Crominarity*, 86 Miss. 464, 38 South. 633. If the plaintiff and his witnesses are to be believed, the accident in this case was due to the negligence of the engineer and fireman in failing to blow the whistle and ring the bell at the crossing, as by statute it was their duty to do. Travelers on the highway have a right to insist that these signals be given, not only that they may keep off the track, but that they may not drive their teams so near the track that fright will certainly follow. In this case the fright led to the killing of the horse by the train. It is true the defendant's servants denied that there was any negligence; but this conflict was for the jury, not for the court.

The peremptory instruction was improper, and the case is therefore reversed and remanded.

ST. LOUIS & S. F. RY. CO. *v.* SHORE *et al.*

(Supreme Court of Arkansas, March 1, 1909.)

[117 S. W. Rep. 515.]

Railroads — Operation — Fires— Statutes — Constitutionality.*— Act April 18, 1907 (Acts 1907, p. 336), making railroad companies liable for damages caused by fire from a locomotive in the operation of its road, is constitutional and valid.

Statutes—Effect of Partial Invalidity.—If a statute imposing a liability for damages caused by fire in the operation of a railroad be void as to persons operating railroads other than railroad companies, or as to fire communicated by other methods than by a locomotive, those provisions may be eliminated, and leave the statute valid, as applied to fires caused by a locomotive operated by a railroad company.

Evidence—Opinion Evidence—Damages by Fire—Market Value.—In an action for injuries to an orchard by fire, it was proper to permit witnesses to state their opinions as to the market value of the orchard before and after the fire, and to give their reasons therefor.

Appeal from Circuit Court, Washington County; J. S. Maples, Judge.

Action by Thomas Shore and others against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. F. Evans and *B. R. Davidson*, for appellant.

Walker & Walker, for appellees.

MCCULLOCH, C. J. Plaintiffs instituted this action to recover damages to their land and growing fruit orchard, caused by fire alleged to have been communicated from a locomotive operated to the defendant on its railroad. They recovered the sum of \$2,500 in the trial below, and defendant appealed to this court.

It is neither alleged nor proved that the defendant was guilty of any negligence in allowing the fire to escape, and the principal question involved in this case is as to the constitutionality of the act approved April 2, 1907 (Acts 1907, p. 336), making railroad companies responsible for damage caused by fire. The statute is as follows: "Hereafter all corporations, companies or persons, engaged in operating any railroad wholly or partly in this state,

*For the authorities in this series on the subject of statutes making railroad companies liable for all damages by fires set by locomotives, see note appended to *St. Louis, etc., Co. v. Matthews* (U. S.), 6 Am. & Eng. R. Cas., N. S., 361; *Baltimore & O. R. Co. v. Kreager* (Ohio), 18 Am. & Eng. R. Cas., N. S., 99; *Blackmore v. Missouri Pac. Ry. Co.* (Mo.), 21 Am. & Eng. R. Cas., N. S., 360; first foot-note of *McFarland v. Missouri, etc., Ry. Co.* (Mo. App.), 2 R. R. R. 656, 25 Am. & Eng. R. Cas., N. S., 656.

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shall be liable for the destruction of, or injury to, any property, real or personal, which may be caused by fire, or result from any locomotive, engine, machinery, train, car or other thing used upon said railroad, or in the operation thereof, or which may result from, or be caused by any employee, agent or servant of such corporation, company or person upon or in the operation of such railroad, and the owner of any such property, real or personal, which may be destroyed or injured, may recover all such damage to said property by suit in any court, in the county where the damage occurred, having jurisdiction of the amount of such damage, and upon the trial of any such action or suit for such damage it shall not be lawful for the defendant in such suit or action to plead or prove as a defense thereto, that the fire which caused such injury was not the result of negligence or carelessness upon the part of such defendant, its employees, agents or servants; but in all such actions, it shall only be necessary for the owner of such property so injured to prove that the fire which caused or resulted in the injury originated or was caused by the operation of such railroad, or resulted from the acts of the employees, agents or servants of such defendant, and if the plaintiff recover in such suit or action, he shall also recover a reasonable attorney's fee to be ascertained from the evidence in the case by the court or jury trying the same. Provided, that the penalty prescribed by section 1 of this act shall apply only when such employee, agent or servant is in the discharge of his duty as such."

All of the objections made to the statute in question are fully answered by the Supreme Court of the United States in the case of *St. L. & S. F. Ry. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611, upholding a similar statute in Missouri, and we need go no further than to cite that case as an expression of our views on the subject. Mr. Justice Gray, in delivering the opinion of the court in that case, after reviewing the authorities on the subject, said: "This review of the authorities leads us to the following conclusions: First. The law of England, from the earliest times, held any one lighting a fire upon his own premises to the strictest accountability for damages caused by its spreading to the property of others. Second. The earliest statute which declared railroad corporations to be absolutely responsible, independently of negligence, for damages by fire communicated from their locomotive engines to property of others was passed in Massachusetts in 1840, soon after such engines had become common. Third. In England, at the time of the passage of that statute, it was undetermined whether a railroad corporation, without negligence, was liable to a civil action, as at common law, for damages to property of others by fire from its locomotive engines; and the result that it was not so liable was subsequently reached after some conflict of judicial opinion, and only when

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the acts of Parliament had expressly authorized the corporation to use locomotive engines upon its railroad, and had not declared it to be responsible for such damages. Fourth. From the time of the passage of the Massachusetts statute of 1840 to the present time, a period of more than half a century, the validity of that and similar statutes has been constantly upheld in the courts of every state of the Union in which the question has arisen." The learned justice concludes the opinion with the following statement of the law: "The motives which have induced, and the reasons which justify, the legislation now in question may be summed up thus: Fire, while necessary for many uses of civilized man, is a dangerous, volatile, and destructive element, which often escapes in the form of sparks, capable of being wafted afar through the air, and of destroying any combustible property on which they fall, and which, when it has once gained headway, can hardly be arrested or controlled. Railroad corporations, in order the better to carry out the public object of their creation, the sure and prompt transportation of passengers and goods, have been authorized by statute to use locomotive engines propelled by steam generated by fires lighted upon those engines. It is within the authority of the Legislature to make adequate provision for protecting the property of others against loss or injury by sparks from such engines. The right of the citizen not to have his property burned without compensation is no less to be regarded than the right of the corporation to set it on fire. To require the utmost care and diligence of the railroad corporations in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the Legislature may properly consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railroad company, which employs the instruments and creates the peril for its own profit, rather than upon the owner of the property, who has no control over, or interest in, those instruments."

The authorities on this subject are collated in 3 Elliott on Railroads, § 1223, where the rule is stated as follows: "Statutes imposing liability for damages, on account of fires set out by railway locomotives, have been attacked in many of the states where they are in force, on the ground that they are unconstitutional, but in all the decisions, where the question has directly arisen, so far as we have been able to discover, they have been held constitutional." None of the decisions of this court conflict with this rule. The case of *L. R. & Ft. S. Ry. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55, which is cited by the appellant in support of its contention, clearly recognizes the validity of such a statute, for the opinion contains the following: "In Massachusetts, by statute, railroad companies are made absolutely liable for injuries

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by fire communicated from their engines; but in compensation are given an insurable interest in any buildings along the route. The courts have sustained this law, but the nature of it is peculiar and exceptional, and the language too clear to admit of doubt." We are of the opinion that the clause in some of the statutes giving the railroad company an insurable interest is not essential to the validity of the statute.

It is contended that the act is void for the reason that it is not confined simply to cases of fire communicated from locomotives operated by railroad companies, but applies to persons operating railroads, and also to fire communicated by other methods in the operation of railroads. It is sufficient to say that we have no question presented in this case except that of the validity of the statute as applied to the damage done by fire communicated from a locomotive operated by the railroad corporation. If the statute is void as to persons operating railroads, or as to fire communicated in other methods, that part could be eliminated, and still the statute be void so as to apply to cases such as this. *Leep v. Ry. Co.*, 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109.

The only other question raised by this appeal is that of the admissibility of the testimony of certain witnesses introduced by the plaintiff. It is contended that the court erred in this respect, because witnesses were allowed to testify as to damages, basing their estimates upon the product of the land, and not upon its market value; also that some of the witnesses did not show sufficient knowledge and experience to testify as to the amount of the damage. The court in its instruction limited the amount of recovery to the difference between the market value of the land before it was damaged and afterwards. We are of the opinion that all of the witnesses showed sufficient knowledge of land similarly situated in that locality to enable them to testify. While it is true that some of them based their opinions upon the estimated yield of fruit of the orchards on the land, the questions propounded were as to the market value, and the jury must have understood from the opinions expressed by the witnesses that they were giving the market value based upon the estimated yield of crop. It was proper to permit the witnesses to state their opinions as to the market value, and to give their reasons therefor, so that the jury might determine what force to give to the testimony. It was, after all, a question for the jury to determine under the instructions of the court, and upon all the evidence adduced, as to what the difference in the market value was before and after the damage. *L. R. Jct. Ry. Co. v. Woodruff*, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51; *K. C. S. Ry. Co. v. Boles*, 115 S. W. 375, 15 Ark. Law Rep. 614.

We find nothing in the record which violates this rule. Therefore no error of the court was committed.

Judgment affirmed.

CHENOWETH *v.* SOUTHERN PAC. CO.

(Supreme Court of Oregon, Jan. 19, 1909.)

[99 Pac. Rep. 86.]

Railroads—Fires—Evidences—Prima Facie Case.*—Evidence that the fire which destroyed plaintiff's property was caused by sparks emitted from a passing engine operated by defendant is sufficient to establish a prima facie case of defendant's negligence.

Railroads—Fires—Negligence—Question for Jury.—Where, in an action for the destruction of plaintiff's property by fire set out by defendant railroad company, plaintiff establishes a prima facie case of negligence, and there is direct evidence on defendant's part as to its care and diligence, it is the court's duty to submit the question to the jury, unless defendant's evidence is such that a verdict for plaintiff could not be sustained if returned.

Railroads—Fires—Negligence—Question for Jury.—In an action for the destruction of plaintiff's property by fire set out by defendant's engines, evidence held to require submission of the question of defendant's negligence to the jury.

Railroads—Fires—Evidence—Scattering Sparks.†—Evidence that defendant's engines just prior or subsequent to the fire scattered sparks is not sufficient to impute negligence.

Railroads—Fires—Evidence.‡—Proof of fires caused by other engines in the vicinity of the fire in question and about that time is an element tending to strengthen the presumption of negligence in equipping and operating defendant's engines generally.

Railroads—Fires—Presumptions of Negligence.‡—Where plaintiff's right to recover for the destruction of his property by fire set out by defendant railroad company depends on the presumption of negligence arising from the fact that the fire started from defendant's engines, and the jury finds that defendant actually used the most approved appliances to prevent the escape of fire, or exercised reasonable diligence to obtain and use them, and they were in good repair at that time, and the engines were carefully operated, such proof successfully overcomes the presumptions of negligence, and entitles defendant to a verdict, unless there are other circumstances to establish negligence.

Railroads—Fires—Burden of Proof.—In an action against a railroad company for burning plaintiff's property, the burden is on defendant to show want of negligence.

Railroads—Fires—Instructions.—The court charged that the pre-

*See second foot-note of *Osburn v. Oregon R. & Nav. Co.* (Idaho), 31 R. R. R. 456, 54 Am. & Eng. R. Cas., N. S., 456.

†See first foot-note of *Sims v. American Ice Co.* (Md.), 31 R. R. R. 463, 54 Am. & Eng. R. Cas., N. S., 463.

‡See second foot-note of *Woodward v. Chicago, etc., Ry. Co.* (C. C. A.), 25 R. R. R. 672, 48 Am. & Eng. R. Cas., N. S., 673, where all the authorities in this series on the subject, preceding it, are collected.

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sumption of negligence arising from evidence that fire was communicated from defendant's engines was rebuttable, and might be overcome by proof that the engines alleged to have caused the fire were properly constructed, and had the most approved appliances for arresting sparks, and were carefully operated in a skillful manner by competent employees; that defendant was not bound to use the best and most approved appliances, but was bound to exercise reasonable care in obtaining the most approved mechanical engines and appliances to prevent the escape of fire and putting them into practical use; that the gist of the action was negligence, which must be sustained by proof, as defendant could not be liable for unavoidable or unusual consequences of the proper operation of his trains. Held, that such instructions could not cover a requested charge that if the jury found defendant's servants, in operating the train in question, acted as reasonably prudent and careful persons having due regard of the rights of others would have acted under the same circumstances, defendant was not negligent in operating the train, and that if defendant actually used on the engine drawing the train the most approved appliances to arrest fire, or had exercised reasonable care and diligence to obtain and use them, defendant was not negligent in that respect, and that the refusal of such request was error.

Witnesses—Credibility—Evidence.—Where defendant's engineers testified that they did not work steam down a certain grade and through a station where plaintiff's property was burned by fire alleged to have been communicated from an engine, they could not be discredited by proof that 10 years prior to that time, when witness was in defendant's employ as a brakeman or conductor, it was not customary for trains to shut off and drift down such grade and through the station.

Witnesses—Competency—Knowledge.—Where a railroad engine inspector did not inspect the engine in question, he was incompetent to testify as to such inspection from a record alleged to have been made by the employee who did inspect it.

Witnesses—Cross-Examination.—Where a witness was not examined in chief as to other fires having been set by defendant's engines, he was not subject to cross-examination with reference thereto.

Appeal from Circuit Court, Douglas County; J. W. HAMILTON, Judge.

Action by S. J. Chenoweth against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

This is an appeal from a verdict and judgment in favor of plaintiff for loss of hay by fire, alleged to have been caused by the emission of sparks from engines of defendant, resulting from improper construction and careless and negligent management and operation of said engines. Plaintiff's hay was in a ware-

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house, within 35 feet of defendant's track, at Wilbur Station. Defendant denies that the fire was caused by its negligence, that its engines were defective in construction, or carelessly or negligently operated, or that by reason thereof large quantities of sparks were emitted or occasioned the fire. Plaintiff established, by the evidence, a state of facts from which the jury might infer that the fire was set by sparks from the engines attached to a freight train passing north a few minutes prior to the discovery of the fire. The railroad track is on a down grade of less than 1 per cent. from the whistling post south of the station and for a half mile beyond, being about 12-100 per cent. at the station. There was evidence tending to show that, at a point about one-fourth of a mile south of the warehouse, smoke and sparks were being emitted by the engines; that the engines were running fast—"running right along"—and that the engines were working; that there had been other fires that summer, caused by passing engines, a mile or two north of the station, and on or near the right of way; that there was evidence tending to show that a mile north of the depot the engines of this same train threw sparks 35 feet from the track and set fire to the grass. At this point the track was upgrade, and the engines were working. Defendant produced the testimony of the engineer and fireman on each engine, and of the inspector of engines, tending to prove that the three engines attached to this train were properly and skillfully constructed, with all the late devices for preventing the emission of sparks or the escape of fire, and were in good repair at that time; and that they were properly and skillfully managed by competent employees. At the close of the testimony defendant requested the court to instruct the jury to return a verdict for defendant, on the ground that plaintiff had not proved a case sufficient to be submitted to the jury, namely, that the presumption of negligence, on defendant's part, arising from the evidence tending to show that the fire had been caused by defendant's engines, had been overcome by the court. A verdict and judgment were rendered for plaintiff, from which defendant appeals.

Wm. D. Fenton and *R. A. Leiter*, for appellant.

Fullerton & Orcutt, for respondent.

EAKIN, J. (after stating the facts as above). The first contention of defendant is that the court erred in denying defendant's request to direct a verdict in its favor. This request assumes that there was no other evidence of negligence on part of defendant than that presumed from the proof that defendant's engines caused the fire. It is generally recognized by the authorities as sufficient to make a *prima facie* case of negligence against a defendant, when the plaintiff establishes such a state of facts

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as will justify the jury in finding that the fire was caused by sparks emitted from a passing engine operated by defendant, and, if not overcome by other evidence, will justify a verdict for plaintiff. It is also conceded that if the defendant has adopted the most approved devices for preventing the escape of fire, or has exercised reasonable care and diligence to obtain and use them, and they are carefully managed and operated by skilled employees, such *prima facie* presumption of negligence arising from the fact that defendant's engines caused the fire will be rebutted. But there is a conflict among the authorities as to the effect of this *prima facie* presumption, some of the courts holding that, even when such presumption is sanctioned or created by statute, only an artificial presumption of fact arises, whose sole object is to cast the burden of proof upon the defendant to show want of negligence, and that, when the burden is shifted, the presumption is *functus officio*; that, when the evidence for defendant has established proper equipment and operation of its engines, this overcomes such presumption; and, if there is no other proof of negligence or want of care on defendant's part, it is a question of law for the court, and it should direct a verdict for the defendant. *Smith v. Northern Pac. R. R. Co.*, 3 N. D. 17, 53 N. W. 173; *Olmstead v. Railroad*, 27 Utah, 515, 76 Pac. 557; *Louisville & Nashville R. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620; *Menominee River Sash & Door Co. v. Milwaukee & Northern R. R. Co.*, 91 Wis. 447, 65 N. W. 176; *Gainsville, Jefferson & South. R. R. Co. v. Edmondson*, 101 Ga. 747, 29 S. E. 213; *Woodward, et al. v. Chicago, M. & St. P. Ry. Co.*, 145 Fed. 577, 75 C. C. A. 591.

The holding of many other courts is to the effect that a *prima facie* case of negligence, made by plaintiff standing on the one side of the issue, and the direct evidence of the defendant, as to its care and diligence, upon the others, it is the duty of the court to submit such conflict to the jury. *Atchison, T. & Santa Fe Ry. Co. v. Geiser*, 68 Kan. 281, 75 Pac. 68, 1 Am. & E. Ann. Cas. 812; *Hemmi v. C. G. W. Ry. Co.*, 102 Iowa, 28, 70 N. W. 746; *Great North. Ry. Co. v. Coats*, 115 Fed. 452, 23 C. C. A. 382; *McCullen v. Chicago & N. W. Ry. Co.*, 101 Fed. 66, 41 C. C. A. 365, 49 L. R. A. 642; *Central Ry. Co. v. Trammell*, 114 Ga. 312, 40 S. E. 259; *South. Ry. Co. v. Williams*, 113 Ga. 335, 38 S. E. 744; *Karsen v. M. & St. Paul Ry. Co.*, 29 Minn. 12, 11 N. W. 122; *Kenney v. Hannibal & St. Joseph Ry. Co.*, 80 Mo. 573; 2 Thompson on Neg. 2287, 2290.

The *Atchinson, T. & Santa Fe Ry. Co. v. Geiser*, *supra*, is well annotated in 1 A. & E. Ann. Cas. 812, upon this question sustaining the opinion in that case. The theory of these latter cases is that it is a question for the jury to say whether or not the defendant has succeeded in rebutting the *prima facie* presumption of negligence raised by the fact of the communication

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of the fire by an engine of defendant. 2 Thompson, Neg. 2287; Sappington v. Missouri Pac. R. Co., 14 Mo. App. 86. If there is no other evidence tending to establish the negligence of defendant than the presumption above referred to, and the testimony of defendant's witnesses is full and complete as to the proper construction, good equipment, and repair of the engine, and satisfactory character of the management and operation thereof by competent employees, this is sufficient to justify the jury in finding for the defendant; and, if it is so conclusive that an opposite finding would not be sustainable, then, of course, it becomes a matter of law for the court, and it should direct the verdict. As said by Mr. Justice Lord, in Koontz v. O. R. & N. Co., 20 Or. 3, 36, 23 Pac. 820, 827, when considering this identical question: "When a court is asked to declare a fact established as a matter of law, the evidence ought to so completely and irrefutably establish the fact as to free the mind from all doubt and hesitation." Judge Sanborn, in Woodward v. Chicago, M. & St. P. Ry. Co., 145 Fed. 585, 75 C. C. A. 594, says: "If the proper employees of the railway company have testified to the effect that there were no defects in the locomotive, or that reasonable care had been used to avoid them, and that the engine was operated with ordinary care and skill, and the evidence at the close of the trial is so conclusive that an opposite finding is not sustainable, the statutory presumption has been overcome as a matter of law, and it is the duty of the court to instruct the jury in a fire case from these states, as in other cases, to return a verdict for the railway company."

But there may be physical facts tending to strengthen this presumption or the interest of the witness, or the character of his testimony may be such as to materially weaken his testimony, although it is not directly contradicted by any other witness. Sappington v. Missouri Pac. R. Co., 14 Mo. App. 86. As said in McCullen v. C. & N. W. Ry. Co., 101 Fed. 66, 41 C. C. A. 365, 49 L. R. A. 642: "A jury is not necessarily bound to accept as conclusive the statement of a witness that an engine was in good order, or carefully and skillfully operated, although there is no direct evidence contradicting the statement. They have a right to consider all the evidence and circumstances bearing upon the condition and mode of operating the engine, as well as the circumstances under which the fire took place. Moreover, if the jury were satisfied, and so found, that the mill was ignited by a spark which came from one of the defendant's locomotives, it may well be that this fact alone would have led them to discredit the statements of the defendant's witnesses concerning the condition of the locomotives and how they were handled. * * * We are of the opinion that the correct view is that, when the evidence which is offered by a plaintiff to make out his cause of action creates a presumption of negligence, the case

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should be submitted to the jury, unless the rebutting evidence is so clear and circumstantial that no reasonable person could doubt its verity."

To the same effect is *Karsen v. M. & St. Paul Ry. Co.*, 29 Minn. 12, 11 N. W. 122, and *Greenfield v. C. & N. W. Ry. Co.*, 83 Iowa, 270, 49 N. W. 95. In *Sappington v. Missouri*, *supra*, upon this subject, the court say: "The jury is not bound to believe, contrary to their own experience, that sparks from an engine in perfect order, of the most improved pattern, will escape from a passing engine, without any negligence or incompetence on the part of the fireman or engineer, so as to set fire to neighboring property, merely because the fireman and engineer swear that they were careful and competent, and because officers of defendant testify that the machinery was of the best kind and in good order. Where sparks have escaped, and a fire, commencing with plaintiff's property, has ensued in consequence, the matter is for the jury."

In such a case it was also said in *Brown v. Missouri Pac. Ry. Co.*, 13 Mo. App. 462, that the jury are entitled to take into consideration the physical facts of the case. Thompson on Negligence, § 2234, very severely criticises the authorities that hold to the contrary, and at section 2289 approves the language quoted above from *Sappington v. Missouri Pac. Ry. Co.*, and *Brown v. Missouri Pac. Ry. Co.*, as embodying the true theory, "which is that where there is, in any case, evidence of negligence to go to the jury and countervailing evidence is offered by the defendant, it is for the jury to say whether the inference of negligence has been rebutted. When the presumption created by proof of the fact of the escape of fire from the locomotive has been thus rebutted by proof of its proper construction, of its being in proper repair, of its being properly and carefully managed, the plaintiff cannot sustain his action without making other proof of negligence." And in the next section he says: "The trial court might well have charged the jury in this case, and in the preceding case, that the imputation of negligence resulting from the communication of the fire from the engine of the defendant was rebutted by evidence that the engine was carefully and skillfully managed and was provided with improved spark arresters; but whether the testimony adduced by the defendant that such were the facts was to be believed was for the jury and not for the court."

However, in this case the evidence at the close of the trial was not so conclusive of a want of negligence as to free the mind from doubt, or that an opposite verdict might not be sustained. There was evidence tending to show that the track was on a down grade toward Wilbur from the whistling post, about a mile south of the station. The engineer and fireman testify that the steam was shut off at the whistling post, and the train allowed

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to drift past the station by its own *momentum*, and that it was unnecessary to use steam, and that the engine, when not working steam, will not emit sparks. Yet there was testimony tending to show that within a quarter of a mile from the station the engines were working and emitting sparks; also, that about a mile north of the station, on an up grade, the same engines, a few minutes later, did emit sparks, and actually set fire to the grass beyond the right of way, which tends in some degree to show a fault in the equipment or operation. *Koontz v. Oregon Railway & Navigation Co.*, 20 Or. 3, 23 Pac. 820; *McTavish v. Great North. Ry. Co.*, 8 N. D. 333, 79 N. W. 443; *Lake Erie & West. R. R. Co. v. Holderman*, 56 Ill. App. 144; *Atchinson, etc., Ry. Co. v. Geiser*, 68 Kan. 281, 75 Pac. 68; *Central Ry. Co. v. Trammell*, 114 Ga. 312, 40 S. E. 259; *Norris v. Baltimore & O. S. W. R. Co.*, 109 Fed. 591, 48 C. C. A. 561.

Evidence that the engine, just prior or subsequent to the fire, scattered sparks, is not sufficient to impute negligence. It is only when emitting them in unusual quantities or of unusual size that it has that effect. *Anderson v. Oregon R. R. Co.*, 45 Or. 211, 77 Pac. 119; *Farley v. Mobile & O. R. Co.*, 149 Ala. 557, 42 South. 747. But here was evidence tending to show a subsequent fire caused by sparks from the same engines some distance from the track. *Smith v. Chicago, M. & St. P. Ry. Co.*, 4 S. D. 71, 55 N. W. 717. Also proof of fire caused by other engines in that vicinity and about that time is an element tending to strengthen the presumption of negligence in equipment or operation generally (*G. Trunk R. R. Co. v. Richardson et al.*, 91 U. S. 454, 23 L. Ed. 356; *Koontz v. O. R. & N. Co.*, *supra*; *Atchinson, etc., Ry. Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362), and with the other circumstances referred to tends to make an issue for the jury as to whether plaintiff's evidence, tending to establish negligence, has been overcome by defendant's proof of proper equipment and care in operation. Therefore, upon the whole case, it was proper to submit the case to the jury.

Another assignment of error relates to the refusal of the court to give the following instruction: "Even though you find that defendant's engines caused the fire complained of, if you further find from the evidence that defendant's engines were properly constructed, and had the most approved appliances for arresting sparks and cinders, and were carefully operated by skillful and competent employees, then I instruct you that this presumption is overcome, and plaintiff cannot recover without making proof of other negligence or want of ordinary care, as alleged in the complaint, and if you find that plaintiff has failed to introduce such proof, then your verdict must be for the defendant." We think the requested instruction embodies the law upon that feature. Where plaintiff's case depends upon the presumption of negligence arising from the fact that the fire was

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ignited by defendant's engines, and the jury finds from the evidence that the defendant actually used on these engines the most approved appliances for the purpose of preventing the escape of sparks or fire, or has exercised reasonable diligence to obtain and use them, and they were in good repair at the time of the fire, and the engines were carefully operated by skillful and competent employees, such evidence successfully overcomes such presumption of negligence, and entitles defendant to a verdict, unless there are other circumstances proved tending to establish negligence.

Defendant also requested the court to instruct the jury that: "If you find from the evidence that the servants of defendant engaged in operating the train in question acted under all the attending and surrounding circumstances as reasonably prudent and careful persons, having due regard to the rights of others, would have acted under the same circumstances, then I instruct you that the defendant was not careless or negligent in operating said train or engines." And also the following: "If you, therefore, find from the evidence that the defendant has actually used on the engines drawing this train the most approved appliances for the purpose of preventing sparks or fire from escaping, or has exercised reasonable care and diligence to obtain and use them, then I instruct you defendant was not negligent in said respect." Both instructions were refused. These, and the former one, we think, contain a fairly correct statement of the law, and should have been given, if not included, in the general instructions. Negligence on the part of the defendant is the basis of plaintiff's right to recover in such a case. The rule in railroad fire cases that casts the burden upon defendant to show want of negligence is an exception to the rule in other cases of negligence, in which plaintiff is required to prove the negligence. 13 A. & E. Ency. 497. And, when defendant establishes by preponderance of the evidence due diligence and care in these particulars, it is not liable for the damages resulting from the fire, although the fire was occasioned by its engines, and the instructions should fairly present to the jury this element of the defense; but, if fairly covered by the instructions given, it was no error to refuse the requests.

Instruction No. 7, given by the court, among other things, includes the following: "This presumption of negligence, if you find from the evidence that the fire causing the damage was communicated from defendant's engine, is a rebuttable presumption, and may be overcome by proof on the part of the defendant that the engine or engines alleged to have been the proximate cause was or were properly constructed and had the most approved appliances for arresting sparks and cinders, and was carefully operated in a skillful manner by competent employees. What is meant by that is that, if you find from the evidence that this fire was caused

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by sparks being emitted from defendant's engine, then, as I stated to you, there is a disputable presumption raised to the effect that defendant was negligent, and this is for him to overcome by the defendant showing that the engines were properly constructed and managed."

No. 8. "I instruct you that the defendant was not bound to use the best or most approved appliances for the purpose of preventing sparks or fire from escaping from its engines and being communicated to the property of others. It was the duty of the defendant to exercise reasonable care and diligence in obtaining the most approved mechanical inventions and appliances to prevent the escape of fire, and putting such appliances into practicable use."

No. 9. "I further instruct you that in actions of this character the gist of the action is negligence, which must be sustained by proof, and the defendant cannot be held accountable for unavoidable or unusual consequences of the proper operation of its engines and trains."

These instructions given are in accord with defendant's theory of the defense, and probably sufficiently cover the first request, *supra*, but do not include the second and third, as to what constituted reasonably prudent and careful conduct of defendant's employees, such as will free the defendant from the charge of negligence in that regard; nor that the exercise of care and diligence in the particulars named relieves defendant from liability for damages resulting from the escape of fire, under such circumstances. 13 A. & E. Ency. 517c; *Anderson v. Oregon R. R. Co.*, 45 Or. 211, 77 Pac. 119; *St. Louis S. W. Ry. Co. of Texas v. Knight*, 20 Tex. Civ. App. 477, 49 S. W. 250; *St. Louis S. W. Ry. Co. of Texas v. Connally* (Tex. Civ. App.) 93 S. W. 206; *St. Louis & S. F. Ry. v. Hoover*, 3 Kan. App. 577, 43 Pac. 854. And these instructions requested by defendant should have been given.

Exception was also taken by defendant to the testimony of the witness Hansbrough, called by plaintiff in rebuttal, to the effect that 10 years prior to this time, when he was in the employ of defendant as brakeman or conductor, it was not customary to drift through Wilbur down this grade; that they would shut off steam near the top of this hill, and then about opposite this schoolhouse, this side of Wilbur, they would work steam again. The only purpose of this evidence was to discredit the engineers who testified for defendant that they did not work steam down this grade through Wilbur: and it was clearly incompetent. A custom existing years before and having no reference to the engineers on this train could not have that effect.

The refusal of the court to permit Huntley, the inspector of engines, to testify as to the inspection of engine No. 2,041, being one of the engines attached to this train, was not error. Hunt-

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ley did not inspect this engine, but sought to testify as to the inspection by another person, as disclosed by a record alleged to have been made by that officer. This was not within his knowledge, nor could the book refresh his memory. *Manchester Assur. Co. v. Oregon R. R. Co.*, 46 Or. 162, 79 Pac. 60, 69 L. R. A. 475, 114 Am. St. Rep. 863.

The cross-examination of defendant's witness Harbett as to other fires having been set by defendant's engines was improper. He was not examined upon the matter in chief, but this was probably not prejudicial to defendant, as other witnesses had testified before to the same effect, and there was no testimony to the contrary.

For the errors above assigned the cause will be reversed and remanded for a new trial.

WALLACE v. OREGON SHORT LINE R. CO.

(Supreme Court of Idaho, March 10, 1909.)

[100 Pac. Rep. 904.]

Railroads—Injuries to Animals on Track—Actions—Evidence—Sufficiency.—Held, that the evidence fails to establish any negligence whatever on the part of the railroad company in maintaining a proper gate in its right of way fence, or in keeping such gate closed.

Railroads—Injuries to Animals on Track—Headlights.—It is the duty of a railroad company to equip its railroad locomotives with proper headlights of such power that the engineer can see an animal a sufficient distance ahead of the locomotive to enable him to stop the train before it reaches such animal.

Railroads—Injuries to Animals on Track—Proximate Cause.—Held, under the facts of this case, that as the animal was first seen going toward the track about 150 feet in front of the train, and within the distance the headlight cast a light, and too late to stop the train and prevent the accident, that no negligence is shown on behalf of the railroad company.

Railroads—Injuries to Animals on Track—Animals Seen Near Track.*—When an animal is on the railroad right of way near the track, the train need not be stopped nor its speed checked unless the circumstances indicate that it is likely to move upon the track or probably be injured if it remains stationary.

Appeal and Error—Harmless Error—Admission of Evidence.—The admission of certain evidence held not error.

Statutes—Retroactive Operation—Remedies—Evidence.—Where a

*See third paragraph of foot-note of *McDonnell v. Minneapolis, etc., Ry. Co.* (N. Dak.), 31 R. R. R. 471, 54 Am. & Eng. R. Cas., N. S., 471.

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statute affecting the remedy will in a particular case operate to change or defeat the right, it will be held not to apply in such case.

(Syllabus by the Court.)

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action in the probate court by H. E. Wallace against the Oregon Short Line Railroad Company. Plaintiff had judgment, and defendant appealed to the district court, where plaintiff again had judgment, and defendant appeals. Reversed.

P. L. Williams and *D. Worth Clark*, for appellant.

Griffiths & Griffiths, for respondent.

SULLIVAN, C. J. This action was commenced in the probate court for the negligent killing of a colt, and resulted there in a judgment for the plaintiff for \$100 damages. The defendant appealed from that judgment to the district court, and the case was tried there anew before a jury, and resulted in a verdict and judgment for the plaintiff for \$130 damages. It appears from the record that the colt was pasturing at the time it was killed upon the inclosed farm of one Lee, and that the defendant company maintains a right of way fence across said Lee's land, and a gate therein for the use and benefit of the landowner at a private crossing, and it is alleged that the defendant removed the fastening from said gate and permitted the gate to remain without a suitable fastening, and said colt passed through said gate upon defendant's right of way, and was killed by one of its trains. It is also alleged that within three months after the date of said killing plaintiff made a claim in writing upon the defendant for \$150 for the killing of said colt, and that said claim was signed by the owner of said animal, and that the defendant failed and refused to pay the same or any part thereof. All of the material allegations of the complaint that would entitle the plaintiff to recover are put in issue by the answer, and the answer avers that in the killing of said colt the defendant was without fault or negligence, and avers that the killing of said animal was due entirely to the carelessness and negligence of the plaintiff. A motion for a new trial was made and overruled, and this appeal is from the judgment and the order denying a new trial.

One question discussed by counsel for appellant is the sufficiency of the evidence to show that the agents or servants of the railroad company were negligent in the maintenance of the gate through which said colt entered upon the defendant's right of way. It appears from the evidence that the railroad right of way where the animal was killed is inclosed by a fence; that a private road for the accommodation and use of the land-owner, through whose land the railroad ran, was made by the railroad

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company, and a gate put in the fence on each side of the track. It also appears that said gates were properly made, and, when properly shut, would prevent animals from getting on the railway right of way; that on the evening of the accident the owner of the colt, with the owner of the land and the latter's small boy and another person or two, passed through said gates, and the boy stopped behind to close the gate. The evidence shows that he closed the gate, and it does not appear that any one passed through said gate from that time until after the colt had passed through it and was killed by a passing train. It is admitted that, if said gate had been properly closed, said animal could not have gotten through it. It also appears that a short time before the accident the railway company fence gang had put in some new posts at the point where said gate is situated, and prior to that time the railroad company had furnished a chain and lock and key for said gate, and also for the gate on the opposite side of the track; that, when said fence gang repaired said fence, they left the old post, around which was the chain, lying on the ground near where the new post was put in, and did not put it around the new post and lock the gate. It also appears that the private landowner left said gate unlocked, especially during the seasons when he was going through it quite often, and it further appears that such landowner took the lock from the gate through which the colt passed to the gate on the opposite side of the track, and used it there. It is conceded that the fence gang put said new post in properly and put thereon proper cleats between which the ends of the boards composing the gate could be put. From all of the testimony upon this point it clearly appears that it is insufficient to establish any negligence whatever on the part of the railroad company so far as the maintenance of and keeping this gate closed is concerned, as it shows the railroad company had placed a good and sufficient gate there with proper fastenings, and that, if it had been properly closed, the animal would not have gotten through. If the private landowner had not taken the lock away, but had used it for the purposes for which the company had left it there—that is, for locking the gate—this accident would not have occurred. Had the private landowner locked the gate when he went through on the evening the colt was killed, the accident would not have occurred. 3 Elliott on Railroads (2d Ed.) § 1200, clearly states the rules of law governing the question of the maintenance of and the closing of such gates. He states as follows: "At private crossings, as we have before seen, railway companies are often bound to fence their tracks. But at such places a permanent and immovable fence cannot be maintained, for such a fence would prevent the crossing from being used. At such points openings are usually left in the fence and gates or bars erected through which the adjoining owners may pass, and at such places the railway company is

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bound to erect gates, bars, or other appliances which will prevent the entry of animals, and yet enable adjoining owners to pass over the right of way. The company must also exercise due care to see that gates and bars which it erects are kept in proper repair. As a general rule, it is the duty of the company to exercise care to keep gates and bars erected in fences along its right of way closed, and to see that such gates are provided with proper fastenings for keeping them closed. Where such gates are left open by the agents, servants, or customers of the railway company, the railway company will generally be liable for injuries to animals which come upon the track through such open gates. And the company will generally be liable where the gates are left open by third persons or strangers if the company knows that they are open or they have been open for such a length of time as to charge the company with notice, but not otherwise. The company is entitled to a reasonable time in which to learn that gates and bars are open or out of repair, and it will not be liable until it has had reasonable opportunity to close the gate or bars or make repairs. Where gates are left open by the adjoining owner for whose benefit they were erected, or by his servants, the company is not liable to him." We think that a correct statement of the law, and that, where such gates are left open or not properly closed by the adjoining landowner for whose benefit they were erected, the company is not liable for damages that result therefrom.

Something has been said in regard to the duty of the railroad company to see that said gate was locked at all times. From the evidence it appears that the company did furnish a chain and lock and furnished the private landowner with one key to the lock, and that the foreman or boss of the section kept the other key, but there is no requirement of the law that compels the railroad company to keep a farm crossing gate locked. The railroad company is not required to keep a man stationed at such gate all the time to lock it whenever the private landowner goes through. The company provided the chain and the lock, the landowner unlocked the gate and fastened the chain around the post, left the gate unlocked, and took the lock away from that gate. The private landowner was the custodian of one of the keys of said gate, had the right to unlock it and go through, and from the evidence it appears that the gate was closed, and that about sundown of the evening upon which the animal was killed, and perhaps not more than an hour before it was killed, the plaintiff and the private landowner and his son passed through that gate, and, so far as appears from the record, they were the last people who passed through it. From all of the evidence it is clear that, if the boy properly closed the gate, some one thereafter opened it, and the railroad company is not liable, for the reason that the private landowner, who

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was the agent of the owner of the colt, had removed the lock and neglected to lock the gate after having passed through it. If the boy properly closed it, and some other person passed through prior to the time the colt was killed, he was permitted to do so because of the failure of the private landowner to lock the gate, and the private landowner's negligence cannot be charged to the appellant if that was negligence on his part.

The next question for consideration is: Does the evidence show negligence on the part of the agents or servants of the railroad company in the operation of the train which killed the colt? It appears from the evidence that the railroad track at the point where the colt was killed was raised a little above the surface of the ground and practically straight for a long distance; in fact, all the way between Caldwell and Nampa. The engineer having charge of the train that killed the colt testified as follows: "The circumstances of the killing of that animal was: I was coming west on extra engine 606, about 7 o'clock p. m. on the 21st, the day spoken of, and at this place mentioned, just before we got to mile post 464, I saw two colts come up from the side of the track, and run up on the track about 150 feet ahead of the engine. I sounded the whistle, and applied the brakes immediately and stopped, but, before I stopped, I struck the colts, and knocked one of them off the track, and crippled it, and killed the other. I had been keeping a lookout ever since leaving Nampa. I was on the right-hand side of the cab. These colts came on the track on my side. I discovered them as soon as they came on the track. The air brakes on my train was in good condition. There was nothing I left undone that I could have done to have avoided the killing of these animals. It was dark at that time. I could not see the animals before they came into the focus of my headlight. The first I saw of them was when they came up from the side of the track, and came into the light of my headlight." It appears from that evidence that the colt was killed about 7 o'clock on the 21st of November, 1904, which was after dark, and that the colt came on the track immediately ahead of the train, and in such away as to make it impossible to stop his train and avoid the accident. It appears from the evidence that it was a heavy freight train running at the rate of about 25 miles an hour, and that it would require 600 or 700 feet in which to stop it; that the air brakes on the train were in good condition; that there was nothing left undone that could have been done by the engineer to avoid the killing of the animal. This evidence is not contradicted, but it is contended that the evidence shows that said freight train had only an ordinary oil headlight which would not enable the engineer to see an animal in advance of the train along the track, possibly not over 200 feet; that it was negligence on the part of the railroad company to use such a head-

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light; that it was carelessness and negligence on the part of the railroad company to use a headlight that would not enable the engineer to discover an animal a sufficient distance ahead of the train to stop it before it reached the animal. The engineer testified as follows: "I had an ordinary headlight. Possibly you could see an animal 200 feet in advance of the train—something like that. * * * With the immediate appliance of the air brakes, under the circumstances as they then existed, it would be possible, I judge, to stop it within 600 or 700 feet."

In support of respondent's contention, counsel cite *Western Ry., etc., Co. v. Stone*, 145 Ala. 663, 39 South. 723, where it is held that it is negligence for a railroad to operate a locomotive and train of cars at night at so great a rate of speed that it is impossible to stop the train within the distance that the locomotive headlight illuminates the track. In that case the court said: "The tendency of the evidence was to show that at the time and place the train was being run under conditions that rendered it impracticable to prevent injury to the stock in question"—and held that the headlight was insufficient. In the case at bar it appears from the evidence of the engineer and fireman that the colt came upon the track within 100 to 150 feet of the locomotive, when it was first seen by them. The engineer saw it go up the embankment on to the track about 150 feet ahead of the locomotive. This evidence is not contradicted, and it appears therefrom that the colt was not on the track until the locomotive was within about 150 feet of it—too near for the train to be stopped before it struck the colt. So, if the railroad company had had a headlight of sufficient force and capacity to have enabled the engineer to have discovered an animal 600 or 700 feet ahead of the train, that would not have prevented the injury in this case, as the animal only came on the track when the locomotive was within about 150 feet of it. But it is contended by counsel for respondent that, if the locomotive had been provided with a sufficient headlight, the engineer might have discovered this colt on the railroad right of way before it went upon the track. Conceding that to be true, and that the engineer would have discovered the colt on the right of way within time to stop his train before it reached the colt, would its being on the right of way and not on the track have required the engineer to stop his train, had he discovered it on the right of way? It is contended on this point by counsel for appellant that, even if the engineer had seen the colt prior to the time that he did, it would not have been his absolute duty to stop the train unless there was some indication that it was going upon the track, and that the mere fact that the colt was near the track would not impose upon the engineer the absolute duty of stopping the train. In *Yazoo & M. V. R. Co. v. Wright*, 78 Miss. 125, 28 South. 806, the court held that an engineer is

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not chargeable with negligence in running over and killing an animal for failure to stop his train or sounding the whistle when he discovers the animals at the side of the track. In *Yazoo & M. V. R. Co. v. Whittington*, 74 Miss. 410, 21 South. 249, it was held that a train need not be stopped nor its speed checked because animals are discovered near the track, unless there is a reasonable indication that they will go on the track. In *Louisville & N. R. Co. v. Bowen* (Ky.) 39 S. W. 31, the court held that an engineer cannot be required to look out for animals on the side of a railway track, nor give the danger signal nor stop the train, unless such animals are actually on the track or in such an attitude as to induce the belief that there will be danger of killing them. In *Western Railway Co. v. Lazarus*, 88 Ala. 453, 6 South. 877, the court held that, when an animal is perceived near the track of a railroad, the diligence required of an engineer of a moving train is not the same as if it were on the track, and he is not required to stop or check the train unless the circumstances indicate that it is likely to move on the track or probably be injured if it remained stationary. In the *Peoria, P. & J. R. R. Co. v. Champ*, 75 Ill. 577, the court held that the law imposes no obligation upon those in charge of a train of cars to stop the same upon discovering animals grazing near the railway track in anticipation that they may go upon the track and be injured, and the failure to do so is not negligence. We think that the correct rule; and if an engineer observes an animal on the right of way and not on the track, and there are no indications that the animal will go upon the track before the train passes it, the failure to check the speed of the train or stop it is not negligence. When the colt was first seen by the engineer, it was only about 150 feet from the locomotive, coming upon the track. The evidence shows that the engineer did everything possible to be done after the discovery of the animal to prevent the injury, and the contention of counsel for respondent in this case is that the negligence of the railroad company consisted in not having a sufficient headlight on said locomotive. From the evidence in this case it does not appear that it was negligence of the engineer in not discovering the animal a sufficient distance ahead of the engine in which to stop the train before it arrived at the place where the animal entered upon the track; and there is nothing in the record to show that if the engineer could have seen the animal that distance ahead of the train, off the track and on the right of way, its attitude at that time would have in any manner indicated that it was going upon the track. The evidence is therefore not sufficient to show that the accident could have been avoided if the locomotive had been provided with the best headlight in use. The headlight was sufficient to discover the animal before it went upon the track.

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It is next contended that the court erred in admitting plaintiff's Exhibit A, which is a letter written by the attorney of the defendant company to the appellant. This letter contains reference to a claim made by the respondent for the loss of said colt, and the respondent testified that he made a written demand therefor. The oral testimony was let in without objection. That being true, we do not think it was reversible error to admit said letter in evidence. The claim itself as presented was the best evidence, of course, of what it contained; but, secondary evidence having been let in of the fact that a written claim had been made, we do not think it was reversible error to admit said letter in evidence.

The giving of instruction No. 3 is assigned as error. It is contended that by said instruction the court instructed the jury to the effect that the defendant's railroad right of way was not securely fenced. Said instruction is as follows: "If you find at the date of the killing of the said colt, as alleged by the plaintiff, that the railroad of the said defendant was not securely fenced, and such fence was not properly maintained by the defendant at the point the said colt entered upon said road, then you should find for the plaintiff and assess his damages at the value of the colt so killed." That instruction we construe as applying to the gate, which was a part of the fence. That instruction leaves it for the jury to determine whether said gate was properly maintained, and it would have been better if the term "gate" had been used instead of "fence." Said gate was a part of the fence, and no question was raised anywhere in the case in regard to the fence not being sufficient except where the gate composed a part of it.

The giving of instruction 12 is assigned as error. That instruction was given upon the theory that an act passed by the Legislature in 1901 (Sess. Laws 1901, p. 87) provided that a claim in writing for such damages, signed by the owner or his agent, must be made upon the railroad company or corporation within three months after the maiming or killing. That law goes to the proof in such actions, and provides that the killing or maiming is *prima facie* evidence of the negligent killing in case such written notice is served upon the company as therein provided. That act, however, was repealed by section 5 of an act approved March 13, 1907 (Sess. Laws 1907, p. 325). This case was tried in the probate court while said law of 1901 was in full force and effect. At that time the written claim provided for in said act was made *prima facie* evidence of the negligent killing by the railroad company. Judgment was rendered in that court for the plaintiff. An appeal was taken to the district court by the defendant, and just before the case was tried there the act of 1907 repealing section 5 of the act of 1901, making such claim *prima facie* evidence, became a law. If it

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be held that the repeal of 1901 applies to this action, proof of the negligent killing is required to be made by some other evidence than said written claim. If the plaintiff had no other evidence, it will readily be seen where that holding would affect a substantial right of the respondent. The law of 1907, if held to apply to this case, would operate to change the kind of evidence required to establish plaintiff's case. That holding might defeat his right to recover. To now hold that the repeal of that act destroyed the written claim as *prima facie* evidence would materially affect his right, if not defeat it altogether. We therefore conclude that said act of 1907 did not repeal the act of 1901 so far as this case is concerned. Kennett's Petition, 24 N. H. 139; Willard v. Harvey, 24 N. H. 344. However, if the act of 1901 had been repealed prior to the time the written claim was served on the defendant, if one were served, a different rule would apply; but the plaintiff had served his notice, brought his action, obtained a judgment in the probate court upon the rule of evidence then established by the law of 1901, and it would be most unjust to him now to require him to produce other evidence of the negligent killing some two years after that act had occurred. We recognize the rule laid down in Wheelock v. Myers, 64 Kan. 47, 67 Pac. 632, where the court said: "A party can have no vested right in a mere rule of evidence, and, such rules affecting as they do only the remedy, the Legislature may modify them." But that rule is not applicable to the facts of this case.

The cause must be reversed and a new trial granted, and it is so ordered. Costs are awarded to appellant.

STEWART and AILSHIE, JJ., concur.

STARKE *et al.* v. CHICAGO, B. & Q. RY. CO.

(Supreme Court of Nebraska, Dec. 5, 1908.)

[118 N. W. Rep. 1066.]

Railroads—Killing Animals on Track—Evidence—Negligence.*—In an action to recover damages for the killing of an animal by a train of cars upon a railroad track, the mere fact of killing is not sufficient to establish negligence on the part of those in charge of the train. *Burlington & M. R. Co. v. Wendt*, 12 Neb. 76, 10 N. W. 456.
(Syllabus by the Court.)

Commissioners' Opinion. Department No. 2. Appeal from District Court, Webster County; Adams, Judge.

Action by Chris H. Starke and others, copartners, against the Chicago, Burlington & Quincy Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

J. E. Kelby, L. H. Blackledge, T. J. Deweese, F. E. Bishop, and Halleck F. Rose, for appellant.

A. H. Keeney and J. C. Taylor, for appellees.

FAWCETT, C. The petition alleges that on February 9, 1906, defendant negligently and carelessly ran over and killed a horse belonging to plaintiff, which was at the time, without fault on the part of plaintiff, upon defendant's railway track, and prays damages in the sum of \$150. The answer is a general denial.

All that the evidence shows is that in November, 1905, plaintiff placed the animal in question with his other horses in a pasture on the south side of defendant's track; that on the morning of February 9, 1906, the dead body of the animal was found lying on the right of way of defendant on the north side of its track; that the marks on the body indicated that it had been struck by an engine; that there was blood and hair on the ties and rails for a distance of from 40 to 50 yards from where the body of the animal was found; that the track just west of this point is straight for a distance of half a mile; and that a passenger train was scheduled to pass that point, running east, during the night. This is substantially all of the evidence that was offered on the trial of the case. When plaintiff rested, defendant moved the court to direct a verdict in favor of the defendant, which motion was overruled. In this the district court erred.

*For the authorities in this series on the question whether the mere fact of a collision between a train and stock creates a presumption of negligence against the railroad company, see first foot-note of *Kennedy v. Chicago, B. & Q. Ry. Co.* (Neb.), 27 R. R. R. 497, 50 Am. & Eng. R. Cas., N. S., 497; second foot-note of *Martin v. Chicago, etc., Ry. Co.* (Wyo.), 23 R. R. R. 306, 46 Am. & Eng. R. Cas., N. S., 306.

Kinlen v. Metropolitan St. Ry. Co

As early as *Burlington & M. R. Co. v. Wendt*, 12 Neb. 76, 10 N. W. 456, we held: "In an action to recover damages for the killing of an animal by a train of cars upon a railroad track, the mere fact of killing was properly held to be no evidence of negligence on the part of those in charge of the train." The rule there announced has never been overruled or modified in this court.

We recommend that the judgment of the district court be reversed, and the case remanded for further proceedings according to law.

CALKINS and ROOT, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the case remanded for further proceedings.

KINLEN v. METROPOLITAN ST. RY. CO.

(Supreme Court of Missouri, Division No. 1, Dec. 23, 1908. Rehearing Denied Jan. 14, 1909.)

[115 S. W. Rep. 523.]

Trial—Demurres to Evidence—Effect.—A demurrer to the evidence admits as true every fact which the testimony tends to prove and every inference which may reasonably be drawn therefrom.

Street Railroads—Use of City Streets—Use of Streets in Connection with Public—Relative Rights and Duties.*—City streets are public thoroughfares on which all have the right to travel, but neither a pedestrian, a street car, nor a carriage has the exclusive right to their use, and their rights and duties are relative, and all must use reasonable care not to injure each other.

Street Railroads—Operation of Cars—Duty of Motorman in Crowded Streets.†—While a motorman need not stop his car every time a man, horse, or vehicle crosses in front of him, yet, where the streets are crowded, ordinary care requires him to keep vigilant watch for those who, from any cause, are exposed to danger of being struck by the car.

Street Railroads—Operation of Cars—Duty of Motorman in Avoiding Collisions.‡—When a motorman sees, or by ordinary care can see,

*See first foot-note of *Denis v. Lewiston, etc., Ry. Co. (Me.)*, 31 R. R. 516, 54 Am. & Eng. R. Cas., N. S., 516; third foot-note of *Pilmer v. Boise Traction Co. (Idaho)*, 29 R. R. 371, 52 Am. & Eng. R. Cas., N. S., 371; first foot-note of *Ashley v. Kanawha Valley Traction Co. (W. Va.)*, 26 R. R. 520, 49 Am. & Eng. R. Cas., N. S., 520.

†See first foot-note of *Paducah Traction Co. v. Sine (Ky.)*, 30 R. R. 755, 53 Am. & Eng. R. Cas., N. S., 755; last foot-note of *Powers v. Des Moines City Ry. Co. (Iowa)*, 29 R. R. 709, 52 Am. & Eng. R. Cas., N. S., 709.

‡For the authorities in this series on the subject of the duty to so

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a buggy hanging to and sliding along the rail in front of his car, the law imposes upon him the duty to use reasonable care to stop the car or slacken speed to avoid a collision, though whether such duty requires him to come to a full stop depends on the circumstances.

Street Railroads—Operation of Cars—Collision—Negligence—Question for Jury.—Evidence held to present a question for the jury as to the negligent killing of plaintiff's intestate in a collision with a street car.

Street Railroads—Operation of Cars—Collision—Action for Death—Instructions.—In an action against a street railroad company for running over plaintiff's intestate, several eyewitnesses to the accident testified that the car which ran onto the buggy in which decedent was driving ahead of it was a considerable distance behind the buggy just before the accident, varying from 50 to 100 feet or more, and that the motorman, without seeming to try to stop, was looking elsewhere and not straight ahead, and did not sound any alarm, and that when the buggy was struck it was pulling off the track, though one or both of the hind wheels were sliding thereon. The other occupant of the buggy testified that the accident occurred about the center of the block, and that the decedent drove on the track for about 200 feet in order to pass loaded teams approaching, and that he did not hear any bell sounded before they were struck. There was also testimony that the car was running about 15 miles an hour and faster than usual, and ran 40 or 50 feet after it struck the buggy, which was moving at a pretty good gait. A motorman familiar with the car testified that, if in proper order, it could have been stopped at 40 or 45 feet running 15 miles per hour. Held sufficient evidence on which to base an instruction that it was the duty of the motorman to exercise reasonable care to keep vigilant watch ahead for persons and vehicles, and if the decedent was in imminent peril of being struck because the buggy was on or approaching the car track, and the motorman saw him in danger, or if by reasonable care would have so seen him, in time to have slackened speed or to have stopped by reasonable care, and thus have avoided injuring him, but negligently failed to do so, and if by reason of the foregoing negligent acts it found the buggy in which decedent was riding was struck, and he was thrown out and under the car and killed, the verdict must be for plaintiff, even though he negligently placed himself in dangerous proximity to the car.

Trial—Instructions—Assumption of Facts.—An instruction, in an action against a street railway company for the death of a person in a collision, used the following language: "If therefore you find from the evidence that M. L. K. (decedent) was at the time and place in

regulate the speed of street cars as to have them under control, see first foot-note of *Currie v. Consolidated Ry. Co.* (Conn.), 31 R. R. R. 525, 54 Am. & Eng. R. Cas., N. S., 525; seventh foot-note of *Pilmer v. Boise Traction Co.* (Idaho), 29 R. R. R. 371, 52 Am. & Eng. R. Cas., N. S., 371.

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question in a position of imminent peril of being struck by the car mentioned in evidence, and by reason of the fact that the buggy in which he was seated was upon or approaching the track on which said car was running," etc. Held, that it did not assume that he was in a place of danger simply because his buggy was on or near the track, but required the jury to find those facts to be true in the light of other facts and circumstances stated in the instruction.

Street Railroads—Operation of Cars—Collision—Contributory Negligence—Driving in Front of Car.§—If one knowingly drives across a street railroad track in such close proximity to an approaching car as to be struck before he can cross, he is guilty of contributory negligence, and there can be no recovery.

Street Railroads—Operation of Cars—Collision—Contributory Negligence—Driving in Front of Car—Humanitarian Doctrine.||—The humanitarian doctrine does not authorize a recovery where a person injured knowingly drives in front of an approaching car when he knows he will not have time to safely cross, but that doctrine only applies and authorizes a recovery where the injured party is ignorant of or oblivious to the impending danger.

Trial—Instruction Unsupported by Evidence.—An instruction not warranted by the evidence is properly refused.

Street Railroads—Collision—Action for Death in Collision—Evidence of Speed—Application to Case.—In an action for the death of a person in a collision with a street car, evidence as to the speed of the car should only be considered in determining whether the motorman should have stopped his car sooner than he did.

Appeal and Error—Review—Invited Error.—A party cannot complain on appeal of an instruction in harmony with one requested by himself, or of error in instructions requested.

Street Railroads—Care in Avoiding Collision—Determination—Matters for Jury to Consider.—In determining whether or not employees

§For the authorities in this series on the subject of the right to cross street railway tracks in front of a car with knowledge that it is approaching, see second paragraph of second foot-note of *Deutsch v. Trans. St. Mary's Traction Co.* (Mich.), 31 R. R. R. 133, 54 Am. & Eng. R. Cas., N. S., 133; *Carrahan v. Boston & N. St. Ry. Co.* (Mass.), 30 R. R. R. 750, 53 Am. & Eng. R. Cas., N. S., 750; *Adam v. Union Electric Co.* (Iowa), 30 R. R. R. 218, 53 Am. & Eng. R. Cas., N. S., 218; last foot-note of *Riedel v. Wheeling Traction Co.* (W. Va.), 29 R. R. R. 768, 52 Am. & Eng. R. Cas., N. S., 768.

||For the authorities in this series on the subject of the application of the "last clear chance" doctrine, see third foot-note of *Denver City Tramway Co. v. Cobb* (C. C. A.), 31 R. R. R. 188, 54 Am. & Eng. R. Cas., N. S., 188, where all those preceding it are collected; *Jones v. New Orleans, etc., R. Co.* (La.), 31 R. R. R. 512, 54 Am. & Eng. R. Cas., N. S., 512; *Paducah Traction Co. v. Sine* (Ky.), 30 R. R. R. 755, 53 Am. & Eng. R. Cas., N. S., 755; *Atchison, etc., Ry. Co. v. Baker* (Okla.), 30 R. R. R. 230, 53 Am. & Eng. R. Cas., N. S., 230; *Northern Pac. Ry. Co. v. Jones* (C. C. A.), 29 R. R. R. 158, 52 Am. & Eng. R. Cas., N. S., 158; last head-note of *Pilmer v. Boise Traction Co.* (Idaho), 29 R. R. R. 371, 52 Am. & Eng. R. Cas., N. S., 371.

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in charge of a street car did all in their power to avert injury after discovering a traveler's perilous position, or by ordinary care could have discovered it, it is proper for the jury to consider the speed of the car and whether the bell was rung.

Appeal and Error—Objections Below—Instructions.—At a former trial of the same case, requested instructions were given in a modified form, and at a subsequent trial of the case the identical instructions in their modified form were handed up in response to a request of the court, and were given in that form without objection or exception. Held, that no error could be predicated thereon, as the court was justified in assuming that the modifications were acquiesced in, and all objections thereto were waived.

Evidence—Competency of Experts—Distance in Stopping Car.—A witness who is perfectly familiar with the location and conditions that existed where an accident occurred, and of the kind of car which struck and killed a person injured, and who has been a motorman for five or six years prior thereto, constantly running and stopping similar cars, is qualified as an expert to give his opinion as to the distance within which the car in question could be stopped.

Trial—Specific Objections to Evidence—Necessity.—Where counsel refuses to make his objections to evidence specific and certain, it is the duty of the court to overrule the same.

Trial—Specific Objections to Evidence—Necessity—Hypothetical Questions.—An objection to a question should specifically inform the court and opposing counsel of the real point of the objection, and in this respect there is no difference between an objection to a hypothetical question and one made to others.

Street Railroads—Safety of Cars and Appliances—Presumption of Negligence.§—The law requires carriers of passengers to furnish safe cars and appliances in which to convey passengers, and requires them to use ordinary care to prevent injuring persons who have equal rights with them on the streets, and the presumption is that a carrier has obeyed the law regarding such matters, and the law will never presume negligence on the carrier's part.

Negligence—Presumption.§—The law will never presume negligence on the part of any one.

Evidence—Hypothetical Questions—Facts Which May Be Assumed.—A hypothetical question properly assumed that at the time of an accident a street car, by which a traveler was struck, and its appliances, were in good condition, as the law required them to be so.

Appeal and Error—Review—Harmless Error—Exclusion of Evidence.—No error can be predicated on the sustaining of an objection

§See second foot-note of *Chicago Union Traction Co. v. Giese* (Ill.), 27 R. R. R. 195, 50 Am. & Eng. R. Cas., N. S., 195; *Washington v. Rhode Island Co. (R. I.)*, 31 R. R. R. 231, 54 Am. & Eng. R. Cas., N. S., 231; second head-note of *Southern Ry. Co. v. Moore* (Va.), 30 R. R. R. 487, 53 Am. & Eng. R. Cas., N. S., 487.

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to an answer of a witness, where the following questions and answers show that the same testimony was admitted in another form.

Appeal and Error—Review—Discretion of Trial Court—Weight of Evidence.—The question whether a verdict is against the weight of the evidence rests specially in the sound discretion of the trial court, and, if it is not shown that such discretion was abused, the appellate court will not interfere.

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by Elizabeth Kinlen against the Metropolitan Street Railway Company. There was a judgment for plaintiff, and defendant moved for a new trial and in arrest. The motions were overruled, and defendant appeals. Affirmed.

The plaintiff sued the defendant in the circuit court of Jackson county to recover the sum of \$5,000 for the alleged negligence in running over and killing her husband, Matthew L. Kinlen, on the Grand avenue, in Kansas City, with one of its cars. The trial resulted in a judgment for plaintiff for the amount sued for, and, defendant's motions for a new trial and in arrest of judgment proving unavailing, it duly appealed the cause to this court. As the sufficiency of the pleadings is not challenged, we will omit them from the statement of the case. Plaintiff's husband was killed on Grand avenue, almost in the center of the block between Twenty-Third and Twenty-Fourth streets, by being struck by a south-bound car on the west track, the particulars of which will be shown by the testimony of the witnesses. It was admitted that at the time Kinlen was killed he and plaintiff were husband and wife.

The following was the substance of plaintiff's testimony.

Norman C. Hall testified that at the time of the accident he was on the west side of Grand avenue, going north. Mr. Kinlen was killed almost at the center of the block between Twenty-Third and Twenty-Fourth streets on the west track by a south-bound car. When he first saw the buggy, it was on the east side of the street, going south. It started to cross the track in a southwesterly direction. The hind wheel commenced to slide on the track. The car was then 120 to 125 feet away. No bell was rung or signal of any kind given. The driver was trying to get off the track, which seemed to be a little above the pavement, and the wheels "scotted" on the rail. The motorman did not seem to try to stop the car, and it struck the buggy hard and shot it forward onto the horse. Mr. Kinlen was thrown out over Dr. Carl's head and lit on the track. Dr. Carl followed him. Mr. Kinlen went under the car. On cross-examination, Mr. Hall stated that when he first noticed the car it was probably 50 to 100 feet south of Twenty-Third street, and the buggy

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was about 200 to 225 feet south of Twenty-Third street at that time. The right hind wheel was sliding on the west rail of the west track. On redirect examination, he stated that the car was No. 636.

Richard W. Montgomery testified that the block from Twenty-Third to Twenty-Fourth streets was 460.9 feet in length. The roadway from curb to curb was 63 feet in width, and there is a slight grade upgrade going south, which starts about 100 feet south of Twenty-Third street.

Edwin C. Hodkin testified that at the time Mr. Kinlen was killed he was on Grand avenue a little above Twenty-Third street. He saw the buggy going south. He first noticed it passing Twenty-Third street. He was about 100 feet behind the car when it hit the buggy. The buggy got on the track about 125 feet south of Twenty-Third street, and when they tried to get off the track they could not make it. The wheels were sliding on the track, and they were trying to get off. At that time the car was between 100 and 125 feet behind the buggy. The car passed him going south, and he noticed the motorman looking in a southeasterly direction as he passed. They were putting up a signboard over in that direction. The motorman was not looking straight ahead and didn't sound any alarm, and he didn't see any effort made to check the car. The car hit the buggy a good hard jolt, the seat tipped over and broke off, and the men went out. When he got up there Mr. Kinlen was still under the car. The car ran 40 or 50 feet after it struck the buggy. On cross-examination, he testified that the car was running about 15 miles an hour. It did not stop at Twenty-Third street. The buggy was moving along at a pretty good gait.

Claude White testified that he was near Twenty-Fourth and Grand avenue on the east side of the street. He saw two men going south on the east side across the tracks. He saw the car coming south and hit the buggy hard, the seat fell off, and the men were thrown out under the car. When he first saw the buggy on the track, the car was about 100 feet from it, and it kept on coming until it hit the buggy. He noticed the motorman immediately before the buggy was hit, and he was looking east, where there were some painters painting a signboard. He was looking right at this signboard, apparently. Witness was walking north, and the car and buggy were coming towards him. The front right wheel of the buggy was off the track, but the hind wheel was sliding on the rail. While the car was running 100 feet before it struck the buggy, no bell was rung or warning given. On cross-examination, he stated that when he first saw the danger to the men he stopped there to watch. On redirect examination, he stated that it was a dry, dusty, and hot day, and the sun was shining. The motorman stopped when he tipped the buggy. He was looking east until the time he hit the buggy.

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L. E. McGhee testified: That he had previously worked for the Metropolitan Street Railway Company for about two years, and was familiar with the equipment of car No. 636 on July 18, 1903; that he had run on the old Lindell in St. Louis about two years and on the St. Louis & Suburban in St. Louis about three years as motorman; that he had operated cars exactly like car No. 636, and belonging to the same series; that that car running south on Grand avenue between Twenty-Third and Twenty-Fourth streets at the rate of 15 miles an hour on a clear, dry, dusty day, with the equipment in proper order, could be stopped by a reasonably skillful motorman, having due regard for the safety of the passengers on the car, after he saw a person or object in a position of peril ahead of the car in 40 or 45 feet.

Samuel T. Carl testified that he was a physician and was in the buggy with Mr. Kinlen on the day that he was killed. The accident occurred about the center of the block. The buggy was headed in a southwesterly direction. Mr. Kinlen had driven on the track for the purpose of passing two loads of stone on the west side of the street, coming north. They had passed the stone wagons when the buggy was hit. They drove on the track for about 200 feet. Something struck the buggy with a great deal of force. That is all that he remembered until he was at home again after the accident. He did not hear any bell sounded before they were struck. On cross-examination, he stated that his recollection was that they were driving on the west side of the street and were forced onto the track just before they got to Twenty-Third street.

Virgil Cooper testified that at the time Mr. Kinlen was killed he was going south on the west side of Grand avenue between Twenty-Third and Twenty-Fourth streets. The car and the buggy were about 50 or 60 feet apart when he first noticed them. The car was going faster than the ordinary gait. The car continued right on until it struck the buggy. No bell or signal was given during that time. The car hit the left hind wheel of the buggy.

Phillip Welch testified that at the time Mr. Kinlen was killed he was one of the deputy sheriffs of Jackson county. He was on the car standing at the front door. When he first saw the buggy the car was about halfway between Twenty-Third and Twenty-Fourth streets. The car did not stop at Twenty-Third street. Before the car struck the buggy, it was pulling off a little southwest. Part of the buggy was off the track, but the hind wheels were sliding on the track. According to his best opinion the car was all from 100 to 150 feet away from the buggy at the time the wheels started to slide, and the wheels were sliding when the buggy was struck by the car, and the men were thrown out into the middle of the track, and the car

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ran over them. No bell was rung during all of this time. The motorman did not attempt to stop the car until immediately before the buggy was struck. On cross-examination, he stated that he was looking at the buggy because he was afraid they were going to catch up with it. It was then about 100 or 150 feet away, right on the track in front of the car. They did not turn until they passed a team south of Twenty-Third street. As soon as the work wagon passed them they attempted to get off.

Defendant admitted that the Metropolitan Street Railway Company was operating the line at the time of the killing of Mr. Kinlen, and that it was operating the car in question, No. 636, by its agents, servants, and employees at said time. Evidence was offered by the defense in an attempt to show that the men fell out of the buggy onto the track 15 or 20 feet in front of the car, and that the horse then ran away, and that the buggy was not struck by the car at all. Some of the evidence offered by the defense was to the effect that the buggy in which the deceased was riding struck another buggy, and some evidence was offered that it struck a wagon, and some evidence that the men fell out when the wheel of the buggy caught and slid along the rail of the street car track. Evidence was also offered that the buggy had no mark on it. As this theory of the accident was rejected by the jury, it is probably unnecessary to go into the evidence in detail at this point. The motorman, Kopfer, was put on the stand by the defendant, and testified that the buggy appeared in front of the car about 40 feet away, but, "Just as soon as ever I seen them start to drive out in front of me, I seen there was an accident going to occur," and that when he actually undertook the stopping of his car he stopped it in 8 or 10 feet. Such additional facts as are necessary for a proper understanding of the case will be stated in the opinion.

John H. Lucas, Frank G. Johnson, and Halbert H. McCluer, for appellant.

Walsh & Morrison and Virgil Conkling, for respondent.

WOODSON, J. (after stating the facts as above). 1. The first insistence of counsel for appellant is that the trial court erred in refusing its instruction in the nature of a demurrer to the evidence, asked at the close of respondent's case and renewed at the conclusion of all the evidence. A demurrer to the evidence admits as true every fact which the testimony tends to prove, and every inference which may reasonably be drawn therefrom. *Twoney v. Fruin*, 96 Mo. 104, 8 S. W. 784. There was ample evidence tending to show that the hind wheels of deceased's buggy hung to and slid along the rail of appellant's street car track in his endeavor to cross over it from the east to the west side of Grand avenue, and thereby prevented him

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from crossing it as speedily as he would otherwise have done, and that at the time the sliding began the car was 100 feet or more north of the buggy, running about 15 miles an hour, that deceased had no knowledge of its approach, and that by the exercise of ordinary care the motorman in charge of the car could have stopped it or so slackened the speed thereof in time to have prevented the injury.

The streets of our cities are public thoroughfares, upon which all have the right to travel, but neither the pedestrian, the street car, nor the carriage drawn by horses has the exclusive right to the use thereof. Their rights and duties are relative, and all must exercise reasonable care in order not to injure each other. While a motorman in charge of a car is not necessarily required to stop his car every time a man, horse, or vehicle crosses in front of him, yet in populous cities, where the streets are crowded with people, ordinary care requires him to keep a vigilant watch for those who, for any cause, are exposed to danger of being struck by the approaching car. And when the motorman saw, or by the exercise of ordinary care could have seen, Mr. Kinlen's buggy hanging to and sliding along the rail, the law imposed the duty upon him to use reasonable care to stop the car or slacken the speed thereof, and thereby avoid striking him, and whether he did so or not was a question for the jury to determine. That duty may not have required him to bring the car to a full stop. That would depend upon the circumstances of the case, and was properly left to the jury. And as was said by this court in the case of *Oates v. Street Ry. Co.*, 168 Mo., loc. cit. 544, 545, 68 S. W. 906, 908, 58 L. R. A. 447: "The duty of the company in this regard is just the same as the duty of one individual or citizen to another when they meet on the highway and the horse of the one becomes frightened at the vehicle of the other, or at anything upon the vehicle of another. Because a street car carries more people than any other kind of a conveyance, or because it is authorized to run more rapidly than a vehicle can ordinarily be legally driven, or because the rush and restlessness of the age make unreasonable demands for more and more rapid transit along the crowded thoroughfares of populous cities, it does not follow that a street car can be run in disregard of the rights of persons traveling by other means, nor that a street car company is exempt from the common-law duty of every one to exercise ordinary care, nor that it is only liable where the agents act wantonly, maliciously, and heedlessly. *Benjamin v. Street Railway*, 160 Mass., loc. cit. 5, 35 N. E. 95, 39 Am. St. Rep. 446, citing and following *Commonwealth v. Temple*, 14 Gray (Mass.) 69, and *Driscoll v. Street Railway*, 159 Mass. 142, 34 N. E. 171; *Ellis v. Railroad*, 160 Mass. 341, 35 N. E. 1127. These cases are strikingly similar to the case at bar." In that case plaintiff's horse be-

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came frightened at the approaching car and began backing until the buggy was forced onto the track, and then the car was slowed up, but continued to approach the horse, all the while ringing the bell violently, until the car came within a few feet of the horse, when suddenly he wheeled around and ran away and threw plaintiff out and injured him. The court held that was a case for the jury to pass upon.

The case of *Schafstette v. Street Ry. Co.*, 175 Mo. 142, 74 S. W. 826, is a case where the plaintiff drove onto a street car track something more than a block in front of an approaching car, and then turned and drove down the track until struck and injured by the car. At the close of plaintiff's evidence, defendant interposed a demurrer, and in discussing the case this court, on pages 151 and 153, of 175 Mo., on page 828 of 74 S. W., used this language: "This contention is based upon the theory that the plaintiff's own evidence shows he was guilty of such contributory negligence as bars a recovery. The specific negligence claimed is that the plaintiff drove upon the track, or so near it as to make a collision unavoidable, when he saw a car coming a block and a half away. The length of the blocks in the outlying part of the city where this accident occurred is not stated; but, assuming them to be the usual length of 300 feet, the fact is then presented that the plaintiff drove upon the track when the car was about 500 feet away, that is, about the width of Green Lea place, which is 60 feet, and the distance of a block and a half. The court is asked to say, as a matter of law, that to thus drive onto a track, or to turn into a street, when a street car is coming but is 500 feet distant, constitutes such contributory negligence that the plaintiff cannot recover, if the street car runs into the rear of the vehicle. The court is further asked to declare as a matter of law that under such circumstances it is the duty of the citizen to stop and wait until the street car has passed. And *Boyd v. Railroad*, 105 Mo. 371, 16 S. W. 909, and *Watson v. Railroad*, 133 Mo. 246, 34 S. W. 573, are especially relied upon to support these contentions. Those cases correctly declare the law to be that 'one who knowingly crosses a track of a railway, in such close proximity to a moving train as to be struck thereby before he could cross,' is guilty of such concurring negligence as bars a recovery, and that the operatives of a train, seeing a person, who is *sui juris*, approaching the track, have a right to presume that he will stop at a safe distance from the track and not attempt to cross 'immediately in front of the train.' The law thus declared is correct, but it does not apply to or fit the conditions presented by this case. The plaintiff did not attempt to cross the track 'in such close proximity to a moving train as to be struck thereby before he could cross,' nor immediately in front of the train.' The car was 500 feet distant when he went upon the track, and the motor-man could have seen that he was upon the track when the car

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was that distance away from him, and could further have seen that he was not attempting to cross the track at all, but was driving on or near the track and in the same direction that the car was traveling, thus having his back to the car, while the motor-man had his face towards the plaintiff's wagon and could not help from seeing it, if he had looked, and must be held in law to have seen it, because by the exercise of the slightest degree of care he could not fail to see it. In the Boyd Case the deceased stepped upon the track 'immediately in front of the engine,' which was running at a speed of 40 or 45 miles an hour. In the Watson Case, the deceased was struck 'when about stepping' onto the track. Such cases are so radically different from this case that they can have no possible application. It is argued, however, that, if street cars are required to check up every time a person approaches the track, no time can be made, and that the traveling public demands rapid transit. It is true that street cars are not compelled to check up every time a person approaches a track, but it is equally true that if a person is on or so near a track that a car cannot pass without a collision, and the operator of the car sees, or by the exercise of ordinary care can see, the condition of danger of such person, it is his duty to check the speed of the car, or even stop the car entirely to prevent injury to the person. This duty is just the same between street cars and a citizen as it is between any two citizens when using a street. The traveling public has no right to demand such rapid transit on streets of a city as to amount to negligence in the running of the car. The citizen who is not in such a hurry, but is exercising ordinary care while upon the street, has rights that are just as sacred in the eye of the law as those of the hurrying crowds who demand such rapid transit, and if a street car company heeds the demands of the latter class, and thereby negligently injures the former, it must stand the consequences. The rights and duties of street car companies and citizens traveling in vehicles are thus stated in the recent case of *Oates v. Railroad*, 168 Mo., loc. cit. 544, 68 S. W. 906, 58 L. R. A. 447."

In our opinion the facts of this case bring it fairly within the rule announced in those cases. Kinlen was driving south in a buggy on the west side of Grand avenue, and when near the center of the block between Twenty-Third and Twenty-Fourth streets he met two heavily loaded wagons, and in order to avoid them he drove to the east side of the track, and then south until he passed the wagons, and then started to drive back to the west side, when his buggy wheels struck the track and slid along the rail, instead of passing over it. While in that position, according to plaintiff's evidence, the car approached deceased from the rear without warning at a rate of speed of 15 miles an hour, and struck the buggy with such force as to throw the occupants therefrom to the ground in front of the car, and were thereby run over and

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injured. When plaintiff's husband first drove upon the track, the car was more than a block away, and had the motorman kept a vigilant lookout he could have discovered his perilous position in time to have averted the injury, or at least there was ample evidence tending to show that fact. And as said by this court in the case of *Peterson v. Transit Co.*, 199 Mo., loc. cit. 340, 97 S. W. 862: "We know of no inexorable rule of law that requires a traveler in a closed vehicle going along a public street of a city on which a street railroad track is laid to look behind him for an approaching car, of which he has no warning, and of the proximity of which he has no knowledge, every time his horse or vehicle may be about to go on, along, or across the rails of the track." See, also, *Powers v. Transit Co.*, 202 Mo., loc. cit. 283, 100 S. W. 655; *White v. Railroad Co.*, 202 Mo., loc. cit. 562, 101 S. W. 14; *McQuade v. Railroad*, 200 Mo., loc. cit. 158, 98 S. W. 552; *Klockenbrink v. Railroad*, 172 Mo. 678, 72 S. W. 900; *Beier v. Transit Co.*, 197 Mo. 215, 94 S. W. 876; *Latson v. Transit Co.*, 192 Mo., loc. cit. 460, 91 S. W. 909; *Baxter v. Transit Co.*, 198 Mo. 1, 95 S. W. 856; *Zander v. Transit Co.*, 206 Mo. 445, 103 S. W. 1006. We must therefore hold that the action of the court in refusing the demurrer to the evidence was proper.

2. Appellant next complains of instruction number one given for respondent. It reads as follows: "The court instructs the jury that it was the duty of the defendant's motorman, in charge of the car mentioned in evidence, to exercise reasonable care to keep a vigilant watchout ahead for persons and vehicles upon or approaching the track upon which the car in question was running. If therefore you believe from the evidence that Matthew L. Kinlen was, at the time and place in question, in a position of imminent peril of being struck by the car mentioned in evidence, by reason of the fact that the buggy in which he was seated was upon or approaching the track upon which said car was running, and that the motorman saw him in such position of danger, if any, or by the exercise of reasonable care would have so seen him, in time to have slackened the speed of said car or to have stopped the same, by the exercise of reasonable care, and thus have avoided striking and injuring him, but negligently and carelessly failed to do so; and if you further believe and find from the evidence that by reason of the foregoing careless and negligent acts of said motorman, if you find them to have been careless and negligent, the buggy in which plaintiff's husband was riding was struck, and plaintiff's husband was thrown out of the same and under said car and killed—then your verdict must be for the plaintiff, even though you believe and find from the evidence that deceased negligently placed himself in dangerous proximity to the street car mentioned in evidence."

This instruction is assailed for two reasons: (1) Because it is contended there was no evidence upon which to base it. We are

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unable to concur in that view of the evidence. The testimony was ample to warrant the court giving the instruction. The second objection urged against this instruction is directed to the following language contained therein: "If therefore you believe and find from the evidence that Matthew L. Kinlen was at the time and place in question in a position of imminent peril of being struck by the car mentioned in evidence, by reason of the fact that the buggy in which he was seated was upon or approaching the track upon which said car was running." Counsel for appellant contends that the quoted clause was erroneous and prejudicial to the defendant, for the reason that it assumed that deceased was in danger by simply driving on or being near the track. This contention is untenable. The instruction does not assume the deceased was in a place of danger simply because his buggy was upon or near the car track, but it required the jury to find those facts to be true in the light of all the other facts and circumstances stated in the instruction before they could find for plaintiff. There is nothing said in the cases of *Cahill v. Railway Co.*, 205 Mo. 406, 103 S. W. 532, and *Cornovski v. Transit Co.*, 207 Mo. 274, 106 S. W. 51, which sustains appellant's contention or that is inconsistent with the views here expressed.

3. Appellant requested the court to give the five following instructions which were refused, and to the action of the court in refusing each of them the appellant duly excepted: "(19) The court instructs the jury that, although you may find from the evidence that no bell was rung or other warning given of the approach of the car, you cannot find against defendant for the failure to ring the bell or give any warning, and your finding on that issue will be for defendant. (20) The court instructs the jury that there is no evidence that the car was run at a negligent rate of speed at or prior to the time of the accident in question, and on that issue your finding will be for the defendant. (21) The court instructs the jury that there is no evidence that the bell upon the car in question was not sounded prior to the time the car struck the buggy, and on that issue your finding will be for the defendant. (22) The court instructs the jury that there is no evidence that the car of defendant was run at a negligent rate of speed at the time and place of the accident, and on that issue your finding will be for defendant. (23) If the deceased, Matthew Kinlen, knowingly drove across the street car tracks in question in such close proximity to a moving car as to be struck before he could get across said tracks, then your verdict must be for the defendant."

There was evidence which tended to show that the bell was not rung, and that the car was running at a rate of speed of 15 miles an hour in one of the principal streets of Kansas City, where there were many people, vehicles, and teams, which were proper matters for the jury to consider in connection with the other facts

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and circumstances shown in evidence. That being true, there was no error in the court's action in refusing instructions numbered 19, 20, 21 and 22 asked by appellant; but instruction numbered 23 presents a more serious proposition. It in substance, told the jury that, if Kinlen knowingly drove across the tracks in such close proximity to the approaching car as to be struck before he could cross, then their verdict should be for defendant. Counsel for appellant contend that, if Kinlen knowingly crossed the track so close to the car as to be struck before he could cross, then he was guilty of contributory negligence, and the respondent should not be permitted to recover. While, upon the other hand, counsel for respondent insists that said instruction is in conflict with the law known as the "humanitarian doctrine," and for that reason was properly refused. As an abstract proposition, the instruction in our opinion correctly declares the law, and, if there was evidence upon which to base it, then the action of the court in refusing it was reversible error. The humanitarian doctrine does not go so far as to authorize a recovery where the injured party knowingly drives in front of an approaching car, and when he knows he will not have time to cross in safety. To so hold would be equivalent to abolishing the law of contributory negligence. Yes, it would do more than that, for such ruling would make the company absolutely liable when a party is injured in his attempt to cross in front of the approaching car when he knows he has not the time in which to do so; and that, too when the company is guilty of no negligence whatever, for the obvious reason that, if he has not sufficient time in which to cross in front of the car in safety, then as a necessary corollary thereto the motorman would not have the time in which to stop or slacken the speed of the car and thereby avoid the injury.

The law is well settled that, where one even negligently places himself in front of a rapidly approaching train and is injured thereby, he cannot recover, if the employees in charge of the train used reasonable care to avoid the injury, after they discovered his perilous position, or by the exercise of ordinary care might have discovered it. *Harlan v. Railway Co.*, 64 Mo., loc. cit. 483. That being unquestionably the law, then how much stronger should the reason be for holding he cannot recover when he knowingly or willfully steps or drives in front of a rapidly approaching car? *Prewitt v. Eddy*, 115 Mo. 283, 21 S. W. 742. Nor will the law permit a recovery where the injured party knowingly places himself in a place of danger and knowingly or willfully permits the train to strike him, even though the employees in charge thereof could have prevented it by the exercise of ordinary care. The humanitarian doctrine only applies and authorizes a recovery where the injured party is ignorant or oblivious to the impending danger; but, if he knew of the approaching danger, then clearly he would be guilty of such contributory negligence as

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would prevent a recovery, whatever the conduct of the agents in charge of the train might be. Such conduct might render such employee amenable to the criminal laws of the state, but should not mulct the company in damages. There would be no law or justice in holding the company liable under such circumstances, for such conduct would not be within the scope of their express or implied authority to represent the company. There would be no more reason or justice for holding the company liable under such circumstances than there would be for holding the proprietor of a gun store liable for the action of his clerk who knowingly and willfully, while lawfully handling one of his employer's guns, should shoot a person unlawfully, in the store, with the knowledge and acquiescence of such person. In either case the principal, an absolute innocent party, would have to answer for the sins and criminal conduct of the agent and of the injured person. Such a judgment would be based upon injustice and immorality; and therefore, if we look at the instruction from any of the views suggested, it should have been given, if, as before stated, the record contains sufficient evidence upon which to base it. In that regard we wish to state that counsel for appellant has not called our attention to any such evidence, and, after a careful reading of this long record, we have been unable to find any testimony whatever which tends to show that Kinlen had any knowledge of the approaching car prior to the time it struck him; but, upon the contrary, all of the facts and circumstances in evidence indicate that he was totally ignorant and perfectly oblivious to the impending danger which awaited him. We are therefore of the opinion that the action of the court in refusing instruction numbered 23 was proper.

4. The court of its own motion gave, on behalf of the respondent, the following instruction, to which action of the court appellant duly excepted. "(17) The court instructs the jury that they can find for plaintiff only in the event that they find the facts as required by instruction 1, and they will not consider in that connection the failure, if any, to give a warning of the approach of the car nor the excessive rate of speed, if any, of said car." The objection urged upon our attention to this instruction is best stated in the following language of counsel for appellant: "While the facts set forth were not proper to be considered by the jury as acts of negligence which would authorize a recovery, they should, especially the speed of the train, have been considered in determining whether the motorman should have stopped his car sooner than he did. The speed of the car was certainly an element of evidence that should have been considered in determining the distance within which the car could have been stopped. While the speed should have been in that way considered, it should have been in that way only, as shown by the case of *Grout v. Electric Ry. Co.*, 125 Mo. App. 561, 102 S. W. 1026."

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Conceding this objection is well taken, yet appellant is in no position to avail itself of it, for the reason its counsel invited the error by asking instructions numbered 19, 20, 21, and 22, which cover in detail the identical matters embraced in the instruction complained of, and evidently it was given to cover the questions presented in those four instructions. In fact, counsel for appellant so states that to be the fact in their brief filed in this case. The law is well settled to the effect that where counsel requests the trial court to make a ruling, and that request is granted, then such action of the court cannot be complained of, even though it be erroneous. A party cannot complain of an instruction in harmony with one requested by himself. *Thorpe v. Railway Co.*, 89 Mo. 650, 2 S. W. 3, 58 Am. Rep. 120; *Olfermann v. Union Depot Co.*, 125 Mo. 408, 28 S. W. 742, 46 Am. St. Rep. 483. In ruling upon the action of the court in refusing to give instructions 19, 20, 21, and 22, asked by appellant, we hold the trial court properly refused them, for the reason that it was proper for the jury to take into consideration the rate of speed the car was running and whether or not the bell was rung in determining whether or not the employees in charge of the car did everything in their power to avert the injury, after they discovered Kinlen's perilous position, or by the use of ordinary care could have discovered it; and for this same reason instruction numbered 17 was improperly given, but for the reason before stated appellant is in no position to complain of the error for its counsel invited its omission by asking those instructions.

5. Counsel for appellant next complains of the action of the court in not giving instructions numbered 5, 8, 12, 13, and 16 as requested, and to the action of the court in modifying them and giving them in their modified form. The record shows that at a previous trial of this cause these same instructions were asked by counsel for appellant, but, instead of giving them in the form as then asked, the court modified them and gave them as modified, to all of which exceptions were duly saved; but at the last trial counsel for appellant, in response to a request of the court, handed up these identical instructions in their modified form, and the court gave them in that form, without a word having been said by court or counsel regarding their modification. Counsel for respondent insist, and correctly so in our opinion, that there was no objection made or exceptions saved to the action of the court in giving said instructions. The court might well have assumed the modifications of the instructions were acquiesced in by appellant's counsel and that all objections thereto were waived. We must therefore rule this point against appellant.

6. Appellant complains of the action of the court in admitting the following testimony given by the witnesses McGhee and Kopfer.

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McGhee's testimony was as follows: "Q. Are you familiar with that portion of Grand avenue between Twenty-Third and Twenty-Fourth, beginning at a point, say, 150 feet south of Twenty-Third street, and running on south to Twenty-Fourth street? A. Yes, sir. Q. Are you familiar with the grade there? A. Yes, sir. Q. I will ask you a question as a whole, which you may answer yes or no, if you can. Take car 636, which was in use on the Metropolitan Street Railway on July 18, 1903, and say that it was running at the point I have indicated to you, at the rate of 15 miles an hour, that it had an ordinary load of passengers on it, that it was filled with passengers, that it was a clear, dry, dusty day, and the equipment was in proper order, the brakes and controller, going to the south, within what distance could a reasonably skillful motorman stop that car, having due regard for the safety of the passengers on the car, after he saw an object in a position of peril, or a person in a position of peril ahead of the car? Mr. Loomis: The defendant objects to the question because it is not a proper hypothetical question, does not state all the facts proved in evidence, assumes facts which have not been proven in evidence, does not state all the facts and conditions which the witness should know and take into consideration in expressing his opinion upon the subject, and the further objection is that the witness has not shown himself qualified to express an opinion on that proposition. We desire to cross-examine him. Mr. Walsh: If Mr. Loomis will indicate what facts are included in this hypothetical question that are not in evidence, what facts are omitted from this hypothetical question that are in evidence, and the facts which he claims about the surroundings and situation that are left out, I will merely modify my question to meet his objection. The Court: I think, Mr. Walsh, that possibly the witness has not been as well qualified as I would like to have him qualified. I will let Mr. Loomis, before the hypothetical question is answered, examine Mr. McGhee as to his expert knowledge and experience. Mr. Walsh: Very good. Examination by Mr. Loomis: Q. Mr. McGhee, you have never run or operated car 636? A. No, sir. Q. You never saw it to examine it in detail yourself? A. Yes, sir. Q. To examine it? A. No, sir. Q. Just merely saw the car? A. Yes, sir. Q. You never ran it or examined it? A. No, sir. Q. What lines did you run on as motorman? A. I ran on the Old Lindell in St. Louis about two years, and I ran on the St. Louis Suburban in St. Louis as motorman about three years. Q. What line did you run on here? A. On the Fifteenth Street as a gripman. Q. I mean as a motorman. A. And Eighteenth Street as a motorman. Q. What line on Eighteenth street did you run on? A. I was extra; I ran on Vine, Eighteenth, and Brooklyn. Q. How long did you run on that line? A. About nine months. Q. Nine months as an extra? A. Well, I had a regular run, mind

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you, for a short time. Q. Mr. McGhee, don't you know that there wasn't any air brakes on this line at that time? A. I know there was. They all had air brakes. Q. On the Brooklyn line? A. No, not on the Brooklyn. I know there wasn't on the Brooklyn, but there is on the others. Q. That is Vine and Eighteenth? A. Yes, some of the cars are there now that were there then. The Court: Did you run a car of this same series? A. Exactly, that car is out there now; I rode down on it a night or two ago. The Court: Did you ever operate an electric car having the same quantity of electric power and the same braking apparatus and appliances as this car had? A. Not the brake exactly, only on Eighteenth I did. I did on the Eighteenth. Those cars are exactly the same. The Court: As 636? A. All those 600 series are the same cars; the car is the same exactly. The Court: I think the witness is qualified. Mr. Walsh: Now, if I have omitted any facts, I would like Brother Loomis to state them. If I have assumed any facts that are not in evidence, I would like him to state what the facts are. The Court: What facts have been omitted, Mr. Loomis? Mr. Loomis: I have stated my objection, your honor. The Court: What facts have been omitted in the question which ought to have been embodied in the question? Mr. Loomis: I think there are several very important facts. The Court: The objection being too general, and counsel refusing to inform the court as to his specific objection, the objection is overruled. (To which ruling defendant duly excepted.) Answer the question as to the length of time in which the car could be stopped. Mr. Walsh: The distance in which the car could be stopped under those circumstances? A. Between 40 and 45 feet."

And Kopfer's testimony is as follows: "The Court: Very well, what facts are embodied in the question which ought not to be embodied in it? Mr. Loomis: I have made all the objection I care to make, your honor. The Court: Very well, the objection is overruled for indefiniteness. Go ahead, and answer the question, Mr. Kopfer. (To which action and ruling of the court the defendant at the time duly excepted. Question read by the reporter.) A. Why, a man, to take and stop it the right way, a man could stop it, I suppose, in a length and a half of the car, if you will stop it and stop it right, don't just chug it right down. Q. With safety to the passengers, as quick as you can stop it? Mr. Loomis: We make the same objections. (Objection overruled by the court. To which action and ruling of the court the defendant at the time duly excepted.) A. Yes, sir. Q. How long is one of those cars? A. Well, I suppose a car is about 40 feet long. Q. And it would stop in a car length and a half? A. In a car length and a half. Q. That would be about 60 feet. So, in order to insure stopping the car, if you saw somebody, or some object on the track, or approaching the track, you would have to

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begin 60 feet away from it? A. Why, begin right away, just as quick as I could. Q. It would have to be 60 feet away, if it took that distance in which to stop the car? A. Why, of course, for a person to go ahead and stop the car and stop it right. Mr. Loomis: We make the same objection in that question. Q. I will ask you this question. Take a car on a day such as that car 636, loaded with passengers, the brakes being in good order, and the equipment all proper, within what distance can you stop that car, with safety to the persons on the car, within what distance in feet? Mr. Loomis: We object to that question as not a proper hypothetical question. It does not state all the facts proven in evidence, assumes facts not proven in evidence. The Court: What facts are omitted, Mr. Loomis? Mr. Loomis: Well, it does not state all the facts that have been sworn to by these witnesses. The Court: Well, I am asking you what facts are omitted. Mr. Loomis: I was making my objection as specific as I could, your honor. The Court: I want to know, Mr. Loomis, what facts are omitted from the hypothetical questions asked which should be embraced in the question. Can you give me one? Mr. Loomis: I made all the objections, your honor, I care to make to the question."

There are three objections presented to the admission of this testimony: (1) That McGhee was not qualified as an expert witness to give an opinion as to the distance in which the car in question could have been stopped; (2) that the hypothetical questions embraced matters of which there was no evidence, and excluded facts of which there was evidence; and (3) that counsel for respondent had no right to assume in his hypothetical questions that the car, running gear, and other appliances thereof were in good condition at the time the accident occurred. We will discuss these objections in the order stated.

As regards Mr. McGhee's qualification to testify as an expert, the record discloses that he was perfectly familiar with the location and conditions that existed where the accident occurred, and of the kind of car which struck and killed Kinlen, and that he had been a motorman or conductor for five or six years prior thereto, and during all that time had constantly run, stopped, and started similar cars. If that experience would not qualify a man as an expert to give his opinion as to the distance within which such a car could be stopped, then we are at a loss to know what would qualify him. If he could not learn that fact in that length of time, he must have been a man of very poor intellect, and there is nothing in this record to indicate that he was not a man of average intelligence. According to all of the authorities, he was qualified to speak as an expert upon the question. *Meily v. Railway Co.* (Mo. Sup., not yet officially reported) 114 S. W. 1013.

In the second objection, it is contended that the hypothetical questions propounded to the witness did not include all of the

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facts which the evidence tended to prove, and assumed facts to exist which were not proved by the evidence. When this objection was made, both the court and counsel for respondent inquired what facts were included not supported by the evidence, and what matters were excluded which were proven by the evidence, to which counsel for appellant replied that he had made his objection and declined to state specifically the matters referred to in his objections. The court then overruled the objection because they were too general and did not inform the court of the real point it was called to rule upon. There should be no masked batteries in the trial of a lawsuit. All matters should be uncovered in a manner that the court, counsel, and jury may see and understand all questions presented for determination. No court can intelligently rule upon a question without it understands the question, and, where counsel refuses to make his objections specific and certain, it is then the duty of the court to overrule same, and as was correctly said by Valliant, J., in the case of *O'Neill v. Kansas City*, 178 Mo., loc. cit. 100, 77 S. W. 64: "When an objection is made to a question propounded to a witness, it should be sufficiently specific to inform the court and opposing counsel of the real point in the objection. In this respect there is no difference between an objection made to a hypothetical question and one made to any other question. Rogers on Expert Testimony (2d Ed.) p. 67; *Stearns v. Field*, 90 N. Y. 640." To the same effect is *Heinzle v. Railway*, 182 Mo., loc. cit. 555, 81 S. W. 848.

The third and last objection complains of the hypothetical questions because they assumed the car and its appliances were in good condition at the time of the accident. The law requires carriers of passengers to furnish safe cars and appliances with which to convey them, and requires the carriers to use ordinary care to prevent injuring persons who have equal rights with them upon the streets. The presumption is that the carrier has obeyed the law regarding those matters, and the law will never presume negligence on the part of the carrier, or on the part of any one else for that matter. That being true, we are of the opinion that the question properly assumed the car and its appliances were in good condition at the time of the accident. The questions simply assume that to be true which the law required the appellant to do, namely, to furnish safe appliances.

We are therefore of the opinion that the objection is without merit.

7. At the trial counsel for appellant propounded the following question to witness Nelson: "Q. Just go ahead and state, Mr. Nelson, what you saw with reference to the accident." In reply thereto the witness made the following answer: "A. They were trying to get ahead of the car—" Before the answer was completed, the following occurred: "Mr. Walsh: I object to that as

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a conclusion of the witness. (Objection sustained, and the answer of the witness stricken out as a conclusion of the witness. To which action and ruling of the court the defendant at the time duly excepted.) Q. Just go ahead and state what you saw the horse and buggy do, how they came to get in front of the car, if they did get in front of the car, and what occurred after they got in front of the car. Go ahead in your own way. A. I don't know how to explain myself now. Q. Go right ahead. The Court: Just state what the people in the buggy did, or what the buggy did, and what the car did, without trying to explain what anybody tried to do, or anything of that sort; just what you saw yourself. A. Well, then, all it was, I seen the seat fall off, and the two men fell in front of the car. Q. How far in front of the car did they fall out of the buggy, as near as you can tell? A. Well, I should judge about 10 feet or so; I am not positive, probably a little longer or a little shorter distance, but probably just about 10 feet." There is no merit in this contention, for the reason that while the court sustained the objection to the answer as given, yet the questions and answers which followed showed that the same testimony was admitted in another form.

8. It is finally insisted that the verdict of the jury is against the weight of the evidence, and for that reason it should have been set aside by the trial court, and the refusal of that court to do so is assigned as error. The question as to whether or not a verdict is against the weight of evidence rests specially in the sound discretion of the trial court, and, if it is not shown that such discretion was abused, then this court will not interfere; but independent of that, after a careful reading of all the evidence preserved in this record, we are of the opinion that the weight thereof preponderates in favor of the respondent.

Finding no reversible error in the record, the judgment should be affirmed.

It is so ordered. All concur, LAMM, J., in result.

HOYLMAN *v.* KANAWHA & M. RY. CO.

(Supreme Court of Appeals of West Virginia, March 2, 1909. On Rehearing, May 12, 1909.)

[64 S. E. Rep. 536.]

1. Carriers—Injuries to Passengers—Contributory Negligence.*—The general rule is that passengers getting off a moving railroad train are chargeable with contributory negligence and cannot recover for injury received therefrom.

2. Carriers—Injuries to Passenger—Contributory Negligence—Burden of Proof.—The act of getting on or off a moving train is evidence of contributory negligence, and imposes upon one who is injured in doing so the burden of proving that the peculiar circumstances of the case justified him in such course.

3. Appeal and Error—Disposition of Case—Reversal—New Trial.—When, in an action against a railroad company for personal injury to a passenger, the evidence is such that a verdict for the plaintiff should be set aside, the circuit court, if asked, should direct a verdict for the defendant, and, if it refuses, the appellate court will reverse judgment and verdict and remand the case for a new trial, unless this court can see clearly that the plaintiff cannot better his case upon another trial. (Syllabus by the Court.)

Error to Circuit Court, Kanawha County.

Action by James H. Hoylman, administrator, against the Kanawha & Michigan Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

Brown, Jackson & Knight, for plaintiff in error.

A. M. Belcher and C. J. Van Fleet, for defendant in error.

BRANNON, J. John L. Porter took passage on a train of the Kanawha & Michigan Railroad at Charleston to go to Wicher, a flag station on that railroad, and in getting off the train was killed, and his administrator recovered in the circuit court of Kanawha county a verdict and judgment for \$5,000 against the railroad company, and the company brings the case here.

There is no conflict of evidence in the case. Tested by the evidence adduced by the plaintiff, the facts are: That Porter sat in the third seat some 10 feet from the door of the car, and he was engaged in active conversation with a passenger, Garten, in the next seat behind him. A friend named Kirby, when the train stopped, went to Porter's seat and carried a bundle out for him and got off the train. Porter did not go with him. Three or four other passengers got off the train. Porter lingered in his seat,

*See note at end of case.

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though the train had stopped, talking to Garten in the next seat behind. He lingered so that that passenger, Garten, who remained on the train, warned Porter that he had better get off the train while it stopped. Porter started for the door, and before he got to the door—indeed, before he left his seat—the train started; but Porter went on down the steps when the train was moving and stepped on the platform holding to the railing of the car with his right hand, and did not let go of it, but held to it while he took two or three steps in the direction the train was moving and increasing in speed, and he lost his balance and fell under the wheels. Before he got out of the door, the train was moving. The conductor swears that a stop of the usual length for that station was made. No evidence contradicts this. Other passengers, three or four, got off. This affords evidence that the length of stop was reasonable. *Hurt v. Railroad*, 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374. There was no crowd. The conductor swears that he stood, as he usually did, at the other end of the car before the one in which Porter rode and looked through both cars to see that all the passengers were off and did not see Porter. There is no contradiction of the conductor in this. A witness of the defense, uncontradicted, says Porter was still talking to Garten at his seat when the train started. This would show that Porter had not yet come out of his seat into the aisle, but was tarrying in his seat talking to Garten. Garten's evidence confirms this. The evidence clearly shows that before Porter got to the door the train had started. The evidence shows that Porter was well acquainted with this station and had reason to know that the usual stop there was of short duration.

"All experience has demonstrated that to get off a moving car is highly dangerous. Therefore it is held that such an act is negligence *per se*, and the passenger, if thereby injured, except in very rare cases, is guilty of contributory negligence and cannot recover." *O'Toole v. Railroad Co.*, 158 Pa. 106, 27 Atl. 738, 22 L. R. A. 606, 38 Am. St. Rep. 830. "An adult who knowingly and unnecessarily steps from a railroad train in motion is guilty of contributory negligence as a matter of law." *Walters v. Chicago & N. W. Ry. Co.*, 113 Wis. 367, 89 N. W. 140. Such is held to be the law in most of the courts. 2 Wood on Railroads, 1292, says that, in view of the danger necessarily attending such an act, it should be held, as a matter of law, that it is negligence to attempt to board or alight from a train while it is in motion, and the question should not be left to the jury unless there are exceptional circumstances tending to excuse or justify the act. "And the great weight of authority favors this view. The failure of the company to stop its train at a station as it ought to do, or to stop if for sufficiently long time, does not justify a passenger in leaving a moving train. His proper course is to be carried on until the train stops, and, if he sustains pecuniary or other loss

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from being carried beyond his station, his remedy lies in an action for damages." The same in *Hutchinson on Carriers*, § 1180.

Now, what fault is imputed to the company? Nobody claims that the conductor or other trainmen saw Porter getting off. The claim is that the stop was not long enough in time; but, in the first place, the evidence is that the stop was for the usual time at that station, and this is proven by the fact that several other passengers got off safely. There is no proof clear that the stop was not reasonable; but, suppose that the stop was not of the proper length of time, the law just cited from Wood and Hutchinson says that, even if the company was negligent in this respect, the passenger must not run the risk of alighting. That is no reason for running a plain risk, especially by an aged person. *McDonald v. Railroad Co.*, 87 Me. 466, 32 Atl. 1010, says that it is the duty of the company to stop a sufficient length of time to give passengers reasonable opportunity to alight with safety. "But the failure of the company to stop its train at a station as it ought to do, or to stop for sufficient length of time, does not justify a passenger in leaving a moving train." In that case we find that he gets off at his own risk. I find in *Simmons v. Air Line, etc., Co.*, 120 Ga. 225, 47 S. E. 570; this: "If, with a clear chance to avoid the consequences of defendant's negligence or breach of duty, the plaintiff voluntarily assumes the risk occasioned thereby, such conduct on his part is not merely contributory negligence, lessening the amount of damages, but a failure to avoid danger, defeating the right to recover." "If all you know of it is that a passenger jumps from a train in motion and is injured, you would charge him with carelessness for the act." *Shannon v. Railroad Co.*, 78 Me. 59, 2 Atl. 678. The case in 87 Me. 466, 32 Atl. 1010, says that: "The burden was on the plaintiff to prove that he jumped from the train under exceptional circumstances that would justify or excuse such an act of imprudence." So holds *Browne v. Railroad Co.*, 108 N. C. 34, 12 S. E. 958. The North Carolina court, in *Morrow v. Atlanta, etc., Co.*, 134 N. C. 92, 46 S. E. 12, held that a person who "alights from the train while traveling at the rate of three to four miles an hour, and with its speed steadily increasing, is guilty of contributory negligence as a matter of law precluding recovery."

The train in this case was going faster than that, the engineer swears 8 or 10 miles an hour, when Porter alighted. The evidence clearly shows that Porter delayed leaving the train and had to be warned to do so by Garten. "Where a passenger delays for an unreasonable time, and it is not apparent to the agent of the carrier that he is either boarding the vehicle or carriage, the carrier will not be held responsible for a resulting injury." 5 Am. & Eng. Ency. L. 579. A passenger, seeing that a train had passed a station and was increasing in speed, jumped from it. It was held that he could not recover, "even though the railroad

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company was negligent in management of the train." *Brown v. Chicago, etc., Co.*, 80 Wis. 162, 49 N. W. 807. *McDonald v. Montgomery R. Co.*, 110 Ala. 163, 20 South. 317, holds: "When a person steps from a moving car without any necessity therefor and is injured, which injury would have been avoided if he had remained on the car, he is guilty of such contributory negligence as will preclude his recovery." That it is negligence to alight from a moving train has been held by the courts of New York, Pennsylvania, Massachusetts, Main, Michigan, Wisconsin, Iowa, Alabama, Georgia, Tennessee, and North Carolina. *Mearns v. Railroad Co.*, 163 N. Y. 108, 57 N. E. 292; *Brown v. Railroad Co.*, 181 Mass. 365, 63 N. E. 941; *Werbowsky v. Railroad Co.*, 86 Mich. 239, 48 N. E. 1097, 24 Am. St. Rep. 120; *Newlon v. Railroad Co.*, 127 Iowa, 654, 103 N. W. 999; *Whelan v. Railroad Co.*, 84 Ga. 506, 10 S. E. 1091, and cases above cited. Porter was a man of 73 years. This called on him to be careful and prudent. The case of *Cumberland V. R. Co. v. Maugans*, 61 Md. 62, 48 Am. Rep. 88, says in the opinion that: "Every one would pronounce it an act of reckless imprudence for a person to jump from a train of cars when in rapid motion, or at night and in the dark, when dangers or obstructions that could not be seen were in the way, or for a person of impaired health and in a weak physical condition, or of an advanced age, to make the attempt when the train was in slow motion." 1 Am. & Eng. Ann. Cas. 779, has the following: "Even where the train is moving slowly, the act of alighting therefrom may constitute contributory negligence as a matter of law if the person so alighting is in a weak physical condition or of advanced age." "Even in jurisdictions where the mere act of alighting from a moving railroad train or street car is not considered negligence *per se*, it is well recognized that cases sometimes arise in which the facts are so clearly established, and the inference as to the course dictated by ordinary prudence is so certain and invariable, that it becomes the duty of the court to take the question from the jury. Thus it has been held that where the act is obviously dangerous and without reasonable necessity, real or apparent, it constitutes contributory negligence as a matter of law, and defeats a recovery by the person injured." 1 Am. & Eng. Ann. Cas. 778, citing many cases. A conductor agreed to let a passenger off at a station, and the conductor rang the bell for a stop. The train did not stop. Held: "When the train fails to stop at a station of destination of a passenger, and he is not directed or induced at the time by act or word of the company's agent to get off, and he does get off, he does so at his own risk." *East Tenn., Va. & Ga. Co. v. Massengill*, 83 Tenn. 328. "The general rule is that passengers injured while getting on or off moving trains cannot recover for injuries. The act of getting on or off a moving train is evidence of contributory negligence, and imposes upon one who

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is injured in doing so the burden of proving that the peculiar circumstances of the case justified him in such course." *Browne v. Railroad Co.*, 108 N. C. 34, 12 S. E. 958.

I find the following syllabus from the United States Circuit Court of Appeals in *Illinois Central v. Davidson*, 64 Fed. 301, 12 C. C. A. 118: "A passenger who unnecessarily and negligently exposes himself to danger while alighting from a train is guilty of contributory negligence, even though he does not know of the danger to which he is exposed." The Texas case (*International, etc., Co. v. Rhoades* [Tex. Civ. App.] 51 S. W. 517) holds: "Where a passenger was injured in alighting from a moving train, he cannot recover, even if he was not guilty of negligence, unless the agent or defendant in charge of the train invited him to so alight, and in so doing he acted with ordinary prudence." "The conductor is required, after having at the proper time announced the station, to stop the train and hold it such reasonable time as will permit passengers to alight in safety. He is not required—to do, what in many cases would be impossible to ascertain—to know that all passengers intending to stop at the station have alighted in safety." *Raben v. Central Iowa Railroad Co.*, 73 Iowa, 581, 35 N. W. 646, 5 Am. St. Rep. 708. "This instruction was erroneous in the particular that it asserts that 'such railroad company is bound to exercise the strictest vigilance in carrying passengers to their destination, and in setting them down safely thereat.' This in its latter portion states the law too strongly in favor of the plaintiff. All the duty the law imposes upon a conductor, acting as the agent of a corporation, in order to comply with the obligations of the carrier to a passenger, is to carry him safely to his point of destination, announce the arrival of the train at the station, and give him a reasonable opportunity to leave the cars. When this is done, the duty of the conductor ceases. *Sevier v. Railroad*, 18 Am. & Eng. R. R. Cas. 245; *Straus v. Railroad*, 75 Mo. 185. And when the servants of a corporation, engaged in the business of a common carrier, afford passengers a reasonable time to leave the cars after arrival at the end of their journey, they have the right, at the expiration of such reasonable period, to assume that all the passengers, whose place of destination is then reached, have done what is customary for passengers in like circumstances to do, to wit, have left the cars." *Hurt v. St. L., I. M., & S. Ry. Co.*, 94 Mo. 262, 7 S. W. 1, 4 Am. St. Rep. 374.

But the negligence of Porter did not consist alone in getting off the train while in motion. He held to the railing of the car for three steps and was thrown under the train. All the witnesses say this. It is beyond question. This was gross negligence. Porter was in full possession of his faculties. A moving train, increasing speed every inch, is a dangerous carriage from which to alight. Even if going slowly, its momentum makes it dan-

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gerous to alight from it. In the case of *Diddle v. Continental Co.* (this term), 63 S. E. 962, we said: That reckless or deliberate encountering of known danger, or danger so obvious that a reasonably prudent man would have avoided it, if the circumstances do not necessitate encountering it, is a voluntary exposure to danger; that unconsciousness of danger does not change the case; that if the danger is obvious, and nothing to preclude deliberation or freedom of action, such as sudden peril, and he encounters danger, the exposure is voluntary. See *Ashtabula Rapid Transit Co. v. Holmes*, 67 Ohio St. 153, 65 N. E. 877.

The defendant asked, but was refused, an instruction that the evidence was not sufficient to authorize a verdict for the plaintiff, and that the jury should find for the defendant. Now the evidence plainly shows that Porter was under no necessity to get off the train while moving and increasing its speed. It was simply a rash act of his own for mere convenience, when he could have gone a mile or so further on the train and come back in a few hours. Law above shows that he was chargeable with negligence *per se* under the evidence, negligence in law. That would inevitably call for a verdict for the defendant, even if we could say, as we cannot, that the company was in fault. We have often said that, where the evidence is such in cases of negligence as that the court would be compelled to set aside a verdict for the plaintiff there, the court ought, if asked, direct a verdict for the defendant. *Ketterman v. Railroad Co.*, 48 W. Va. 606, 37 S. E. 683; *Cobb v. Glenn Boon Co.*, 57 W. Va. 49, 49 S. E. 1005, 110 Am. St. Rep. 734. In *White v. Brewing Co.*, 51 W. Va. 259, 41 S. E. 180, the same test is made; that is, that the court should instruct a jury for a party in whose favor the evidence "plainly and decidedly preponderates." Judge Dent said that, when the evidence was such that two reasonable minds could not differ, the court should not hesitate to direct a verdict, "for thereby justice is promoted, a useless controversy brought to an end, and time, cost, and fruitless labor saved to the litigants, the court, and the public." The same principle is in *Diddle v. Continental Co.* (decided this term) 63 S. E. 962. The Supreme Court of the United States said that it was settled law in that court, "when the evidence given at the trial, with all inferences the jury could justifiably draw from it, is insufficient to suppose a verdict for the plaintiff, so that such verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." *Louisville, etc., Co. v. Woodson*, 134 U. S. 614, 10 Sup. Ct. 628, 33 L. Ed. 1032. A vast array of authorities for this proposition will be found in *Blashfield on Instructions*, § 5. The court should have given the instruction to find for the defendant. The defendant is entitled to have that matter of error passed on in this court.

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This court is of the opinion that the circuit court should have directed a verdict for the defendant. We are clear about this, but the great question then comes up: Shall this court render final judgment for the defendant, or set aside the verdict, reverse the judgment, and remand the case to the circuit court? My own opinion is, long has been, that this court should do what the circuit court should have done, which would be, after verdict for the defendant, to render final judgment for the defendant as if on demurrer to evidence. The plaintiff made his case, and if his case was bad he ought to loose it by final judgment. The suit ought thus to end. This court has so decided in two cases. *Maupin v. Insurance Co.*, 53 W. Va. 557, 45 S. E. 1003, and *Ruffner Bros. v. Insurance Co.*, 59 W. Va. 432, 53 S. E. 943, 115 Am. St. Rep. 924. I later add *Anderson v. Tug River Co.*, 59 W. Va. 301, 53 S. E. 713, and *McMillan v. Coal Co.*, 61 W. Va. 535, 57 S. E. 129, 11 L. R. A. (N. S.) 840. It was decided otherwise this term in *Diddle v. Continental Co.* See full note 8 Am. & Eng. Ann. Cas. 873. I shall not discuss this point further. A majority of the court think that final judgment should not be rendered here, especially as the practice has been generally otherwise, as in *Kuykendall v. Fisher*, 61 W. Va. 87, 56 S. E. 48, 8 L. R. A. (N. S.) 94. I suppose it true that in the past the practice, I say practice, has been to remand. I would reverse that practice, it being a mere matter of practice. All say that, if it clearly appears that the plaintiff cannot better his case, this court may render final judgment.

Instruction No. 8 says that if the train did not stop long enough to enable Porter to leave it while stationary, and that he stepped off while the train was in motion, it was a question for the jury to say whether he was guilty of negligence and barred from recovery. The law is that: If a man leaves a moving train, he does so at his own risk; it is negligence *per se*, negligence in law, for which the court may withdraw the case from the jury.

Instruction No. 4 told the jury that it was the duty "of the defendant to use the greatest possible care and dilligence to safely carry and deliver Porter to his destination, and to stop long enough to afford him reasonable opportunity, by the use or ordinary diligence on his part, to alight, and not to start until he had alighted. If, by the exercise of great diligence, said defendant could have known that Porter was in the act of alighting," the verdict must be for the plaintiff. This instruction might be readily construed as requiring the trainmen to see that every person wanting to get off had gotten off. It demands that a railroad company must exercise great diligence to know that a passenger is alighting. It is the duty of the passenger to get off the train, and the conductor does not have to hunt each and every one up. Of course, where the conductor knows one is alighting, he cannot start; but he need not examine every car in a train to

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see who wants to get off, or that every one has gotten off. But why discuss these instructions? They all declare that, if the company was negligent in not stopping long enough or not seeing to it that Porter was off, then it was liable. They ignore the fact that, under the evidence in the case, the plaintiff's evidence, Porter delayed leaving the car and went from it while moving and held on to it while moving, and was guilty of contributory negligence. If we are right in saying that the court should have directed a verdict, then the plaintiff was not entitled to these instructions; they being unsuited to the case and misleading the jury. Porter's contributory negligence barred recovery.

Again, the court gave for the defendant an instruction that if the train had started while John L. Porter was leaving the car, and was in motion before he went out of said car to the platform, then it was negligence in him to attempt to alight from the car while in motion, and the verdict should be for the defendant. Another instruction was that if the train stopped long enough to allow passengers to alight, and Porter could have left it without injury, had he used diligence, then the jury must find for the defendant. Now, under the evidence, there is no question but that the hypotheses of these two instructions were fully sustained, and therefore this verdict under the evidence is contrary to those instructions given by the court. It is a verdict, as shown by the evidence, against the law of contributory negligence. "A new trial will be granted: (1) Where the verdict is against law. This occurs when the issue involves both fact and law, and the verdict is against the law of the case on the facts proved. (2) Where the verdict is contrary to the evidence. This occurs when the issue involves matter of fact only, and the facts proved require a different verdict from that found by the jury." Grayson's Case, 6 Grat. (Va.) 712.

Therefore we reverse the judgment, set aside the verdict, and remand the case for a new trial if the plaintiff shall be so advised.

On Rehearing.

A petition for rehearing attacks the above opinion for saying that the evidence is not conflicting. It is not appreciably so. The plaintiff proved the true status of the case. He proved by Garten, who was face to face with Porter in the car, that Porter stood talking with him, and that either before he left his seat, some 10 feet from the door, or before he reached the door, the train started. Young, a witness for defense, definitely corroborates Garten. He was in the car, saw Porter lingering in conversation with Garten, and when asked if the train started before Porter left the platform, answered: "Yes, sir; before he went out of the car, before he left Garten, about the time he left Garten." He said further: "At the time the train started, he was shaking hands with Garten. About the

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time the train started, I seen them shaking hands." The plaintiff and defendant both so prove. Keeny, a witness for plaintiff, says: "When I first saw Porter, he was coming down the steps. The train was moving out as he came down." This renders likely the evidence of Garten and Young, for it shows that Porter did not reach the platform or steps until already the train had started. It was "moving out," how fast Keeny could not say; but it was moving out, and Porter had no right to risk its speed, as any one may be deceived as to speed or momentum of a starting train, and any one knows it may increase momentum rapidly, even suddenly. Dempsey, another witness for plaintiff, says: "The train was moving out when I looked around, and he was on the steps." Again, I say he corroborates Garten and Young. He, too, proves that the train had started when yet Porter was on the steps. That the train was moving with considerable, with dangerous, speed when Porter alighted, is beyond question from the fact told by several witnesses for the plaintiff, not contradicted, not open to question; that is, that Porter holding to the railing, was "jerked" and thrown by the car. If it was merely moving at a snail's gait, why did the train "jerk" him and throw him? Here is an undisputed fact proving a physical fact from our knowledge of the law of momentum or force, that the train had already attained a dangerous speed when Porter alighted. Further, Dempsey, a witness for plaintiff, says that Kirby, who had taken Porter's bundle out, was standing there on the back side of the platform as the train pulled out, and "I heard him say to Mr. Carson (brakeman) that old man Porter is on there to get off, and Mr. Carson threw out his hand to shut the engineer off, on the fireman's side, and the fireman, I suppose, was putting in fire. Mr. Carson didn't get any signal from the engine, and he jumped up on the coach as quick as he could and pulled the bell cord, to get hold of the bell cord." This proves that the train had started while Porter was still on the train.

Against all this evidence, counsel appeal to Houchins and Carson, saying that Houchins said, "The first I saw of him I was standing in the baggage car door, and he had one foot on the platform and one on the step, and his right hand holding to the handhold." Asked how far it had moved when he first saw Porter, answered, "Well, it was just starting to move." This does not prove that Porter had alighted before the train started. This does not contradict all the explicit evidence that the train had already started when Porter got off it. In fact, the fair inference from it is that Porter got off while the train was moving, and this is enough to exempt the company, because under the law no one can alight from a moving train except at his own risk, except under peculiar circumstances. This case is not such. Looking at his evidence further, I see that he was

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asked, "When you first saw him, was the train moving? He answered, "Yes, sir." Counsel in their petition for rehearing admit that the above opinion lays down the law correctly, but maybe counsel means that the train was moving slowly. Houchins says, "Well, it was just starting to move." This is indefinite. Are we on this frail, indefinite sentence to contradict and overthrow all the evidence referred to in the original and this opinion? It does not conflict with it really; no substantial conflict. Afterwards Houchins qualifies this statement by the statement that when he saw Porter the train was moving. Counsel cite us to a statement in the evidence of Carson that just as he gave the signal to start he got on the train, looked back, and saw Porter fall; but the plaintiff by Dempsey proved, as above stated, that, when Kirby told Carson Porter was yet on the train, Carson signaled the train to stop and ran for the bell cord. This denies that when Carson stepped on the train Porter was just alighting. Counsel do not say from this that Porter had alighted when Carson saw him, but was in the act of alighting. He could not safely do so. But go further with Carson's evidence. The question was put to him, "Did you see Porter step to the ground?" Answer: "No, sir; I didn't see him. I don't know whether he was on the coach or the platform, could not tell." Question: "Do you know how far the train had moved before you saw Porter falling back?" Answer: "No, sir; I could not tell." Having stated that he gave signal to start, and got on, and saw Porter just as the train moved, it was stated to him that then Porter must have been on the step when he (Carson) saw him, he answered, "I could not tell where he was." Can we say from Carson where Porter was when Carson signaled to start and got on the train? Can we say the train was not going, or going slowly, when Porter got off it? No tribunal, whether judge or jury, having to deal impartially, from reading all the evidence, indeed from reading only the plaintiff's evidence, can help finding, as facts: First, that Porter was yet in the car when its wheels began to move; and, second, that when Porter got off the car its movement was dangerous, as shown by the fact that it jerked Porter and threw him. To say otherwise would be travesty upon weighing and dealing with human evidence. If the train was moving, though apparently slowly, he could not get off except at his own risk, except under peculiar circumstances. This case is not such. The evidence does not really conflict. Suppose it did. Counsel would have us say therefore that a court is powerless to overthrow a verdict. That is not law. Though evidence be conflicting, if the verdict is without sufficient evidence, plainly against the decided, clear preponderance, it may set aside. *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752.

We would not have further detailed evidence beyond the

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reference to it in the original opinion, but for the assertion in the petition for rehearing that we had heard the case, on only "some of the evidence adduced by the plaintiff," and tried a case not presented to the jury. We dislike to express opinions on evidence, or detail it, as we do not feel that on mere questions of fact an appellate court is called upon to detail evidence, or go further than find the result and announce it; but, as the petition calls on us to do so, we make this review of the evidence. But for that, we should not have done so.

We reach the judgment on the evidence, taken as a whole, on the plaintiff's evidence. It is not sufficient to sustain the verdict.

NOTE.

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Cross References to Preceding Authorities in This Series.

Whether Passenger Is Guilty of Contributory Negligence in Alighting from Moving Steam Railroad Train.—See foot-note of *Sevier v. Southern Ry. Co. (S. Car.)*, 32 R. R. R. 198, 55 Am. & Eng. R. Cas., N. S., 198.

Whether Passenger Is Guilty of Contributory Negligence in Alighting from Moving Street Car.—See first foot-note of *Armstrong v. Portland Ry. Co. (Ore.)*, 31 R. R. R. 89, 54 Am. & Eng. R. Cas., N. S., 89; *Birmingham, etc., Co. v. Harden (Ala.)*, 30 R. R. R. 655, 53 Am. & Eng. R. Cas., N. S., 655; *Sandlin v. Lexington Ry. Co. (Ky.)*, 30 R. R. R. 498, 53 Am. & Eng. R. Cas., N. S., 498; *Birmingham, etc., Co. v. Dickerson (Ala.)*, 29 R. R. R. 693, 52 Am. & Eng. R. Cas., N. S., 693; *Cosgrove v. Consolidated Ry. Co. (Conn.)*, 29 R. R. R. 679, 52 Am. & Eng. R. Cas., N. S., 679.

Whether Passenger Is Guilty of Contributory Negligence in Alighting from Moving Train or Street Car at Direction or Invitation of Carrier's Employee.—See foot-note of *Holden v. Great Northern Ry. Co. (Minn.)*, 27 R. R. R. 675, 50 Am. & Eng. R. Cas., N. S., 675.

Whether Passenger Is Guilty of Contributory Negligence in Violating Rules and Regulations of Carrier.—See foot-note of *Missouri, etc., Ry. Co. v. Avis (Tex.)*, 22 R. R. R. 529, 45 Am. & Eng. R. Cas., N. S., 529; *McDonough v. Boston Elev. Ry. Co. (Mass.)*, 20 R. R. R. 641, 43 Am. & Eng. R. Cas., N. S., 641.

Note.

I. IN GENERAL.

1. STEAM RAILROAD TRAINS.

A. Absence of Excusing Circumstances.

It may be stated as a general rule that, in the absence of excusing circumstances of conditions, it is such contributory negligence in a passenger to attempt to alight from a steam railroad train while it is in motion as will prevent recovery against the carrier railroad for his injury or death, if either is caused by such attempt.

United States.—*Mearns v. Central R. R. (C. C. A.)*, 17 R. R. R. 97, 40 Am. & Eng. R. Cas., N. S., 97, 139 Fed. Rep. 543.

Arkansas.—*St. Louis, etc., Co. v. Rosenberry*, 45 Ark. 256, 11 S. W. 212.

Georgia.—*Atlanta, etc., R. Co. v. Dickerson*, 89 Ga. 455, 15 S. E. 534; *Covington v. Western & A. R. Co.*, 81 Ga., 273, 275, 6 S. E. 593; *McLarin v. Atlanta & W. P. R. Co.*, 85 Ga. 504, 11 S. E. 840.

Illinois.—*Cincinnati, etc., R. Co. v. Dufrain*, 36 Ill. App. 352; *Illinois Cent. R. Co. v. Cunningham*, 102 Ill. App. 206; *Louisville, etc., Ry. Co. v. Johnson*, 44 Ill. App. 56; *Ohio & Miss. Ry. Co. v. Stratton*, 78 Ill. 88.

Indiana.—*Jefferson R. Co. v. Hendrick's Adm'r*, 26 Ind. 228.

Iowa.—*Newlin v. Iowa Cent. Ry. Co. (Iowa)*, 19 R. R. R. 360, 42 Am. & Eng. R. Cas., N. S., 260, 103 N. W. 999.

New York.—*Quin v. Manhattan Ry. Co.*, 7 N. Y. St. Rep. 252.

North Carolina.—*Johnson v. Atlanta, etc., R. R.*, 130 N. Car. 488; *Rickett v. Southern Ry. Co.*, 123 N. Car. 255, 31 S. E. 497.

Pennsylvania.—*Railroad Co. v. Aspell*, 23 Pa. St. 147; *Victor v. Pennsylvania R. Co.*, 164 Pa. St. 195.

Wisconsin.—*Walters v. Chicago & N. W. Ry. Co. (Wis.)*, 2 R. R. R. 237, 25 Am. & Eng. R. Cas., N. S., 237, 89 N. W. 140.

If a passenger attempts to alight from a moving train, he does so at his peril, and he cannot recover for injuries resulting from such conduct. So held in *Ohio & Miss. Ry. Co. v. Stratton*, 78 Ill. 88.

B. Not Negligence Per Se.

According to the doctrine almost unanimously supported by the authorities, a passenger is not guilty of contributory negligence per se in attempting to alight from a moving steam railroad train, the question depending upon the circumstances and conditions of the attempt.

Arkansas.—*St. Louis, etc., Ry. v. Person*, 49 Ark. 182, 4 S. W. 755.

California.—*Carr v. Eel River, etc., R. Co.*, 98 Cal. 366, 33 Pac. 213.

Indiana.—*Harris v. Pittsburg, etc., R. Co.*, 32 Ind. App. 600; *Louisville, etc., R. Co. v. Bean*, 9 Ind. App. 240, 36 N. E. 443; *Pittsburg, etc., Ry. Co. v. Gray (Ind. App.)*, 59 N. E. 1000.

Kansas.—*Atchison, etc., R. Co. v. Hughes*, 55 Kan. 491, 40 Pac. 919, 2 Am. & Eng. R. Cas., N. S., 248.

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Michigan.—*Cousins v. Lake Shore, etc., Ry. Co.*, 96 Mich. 366, 56 N. W. 14; *Strand v. Chicago, etc., Ry. Co.*, 64 Mich. 216, 31 N. W. 184.

Missouri.—*Jackson v. St. Louis, etc., Ry. Co.*, 29 Mo. App. 495; *Leslie v. Wabash, etc., Ry. Co.*, 88 Mo. 50, 26 Am. & Eng. R. Cas., 229; *Owens v. Wabash Ry. Co.*, 84 Mo. App. 143; *Price v. St. Louis, etc., Ry. Co.*, 27 Mo. 414, 3 Am. & Eng. R. Cas., 365; *Taylor v. Missouri Pac. Ry. Co.*, 26 Mo. App. 336; *Waller v. Hannibal, etc., R. Co.*, 83 Mo. 608.

Nebraska.—*Chicago, etc., R. Co. v. Landauer*, 39 Neb. 803, 58 N. W. 434; *Chicago, B. & Q. R. Co. v. Hyatt (Neb.)*, 4 Am. & Eng. R. Cas., N. S., 44.

New York.—*Bucher v. New York, etc., R. Co.*, 98 N. Y. 128, 21 Am. & Eng. R. Cas. 361; *Morrison v. Erie Ry. Co.*, 56 N. Y. 302, 6 Am. Ry. Rep. 166.

North Carolina.—*Nance v. Carolina R. Co.*, 94 N. Car. 619.

Texas.—*International, etc., R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102, 38 S. W. 401.

Canada.—*Keith v. Ottawa, etc., Ry. Co.*, 5 Ont. L. R. 116.

Jump from Moving Train—Mixed Question of Law and Fact.—In *Owens v. Wabash Ry. Co.*, 84 Mo. App. 143, it is held that it is not negligence per se for a passenger to jump from a moving train; and the prudence of such action is a mixed question of law and fact, the facts to be found by the jury and their legal effect declared by the court.

From Train Almost Come to Full Stop at Depot.—It is not contributory negligence per se for a passenger to alight from a train which has almost come to a full stop, at a regular passenger depot. So held in *Nance v. Carolina R. Co.*, 94 N. Car. 619.

Obvious Danger from High Rate of Speed Must Be Shown.—Unless it be shown that at the time a passenger attempted to leave a moving car it was running at such a high rate of speed as would render the attempt to alight obviously dangerous the question whether such an attempt was or was not negligence on the part of the person attempting to alight is a question of fact to be determined by a jury. So held in *Coursey v. Southern Ry. Co. (Ga.)*, 21 Am. & Eng. R. Cas., N. S., 412, 38 S. E. 866.

From Moving Train at Night, without Requesting That It Be Stopped.—In *Kansas City, etc., R. Co. v. Matthews (Ala.)*, 17 R. R. R. 79, 40 Am. & Eng. R. Cas., N. S., 79, 39 So. 207, it is held that a plea which alleges that a passenger was guilty of contributory negligence, in that he alighted from a moving train in the nighttime without requesting that the train be stopped, is bad, because requiring the jury to find that decedent was guilty of contributory negligence in alighting while the train was in the slightest motion, though the motion was such as to involve only the risk a man of ordinary prudence would take under the circumstances.

Gross Contributory Negligence.—It is not necessarily gross neg-

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ligence, in every case, for a passenger to attempt to leave a train, even though at the time it be in motion. So held in *Chicago, etc., R. Co. v. Winfrey* (Neb.), 6 R. R. R. 689, 29 Am. & Eng. R. Cas., N. S., 689, 93 N. W. 526.

Stepping from Car to Station Platform.—But a passenger who, knowing that the train is moving, steps from his car upon the station platform is so wanting in ordinary care as not to be entitled to maintain an action against the carrier for an injury resulting therefrom. So held in *Gavett v. Manchester & L. R. Co.*, 16 Gray (Mass.), 501.

C. Prima Facie Contributory Negligence.

But proof that a passenger was injured or killed in attempting to alight from a moving car establishes a prima facie case of contributory negligence on his part. *McDonald v. Boston & Maine R. Co.* (Me.), 2 Am. & Eng. R. Cas., N. S., 293; *Shannon v. Boston & A. R. Co.*, 78 Me. 52, 2 Atl. 678; *Gavett v. Manchester & L. R. Co.*, 16 Gray (Mass.), 501; *Chicago, etc., R. Co. v. Landauer*, 39 Neb. 803, 58 N. W. 434.

Must Prove Reasonable Excuse for Act.—It is prima facie negligence for a passenger to jump off a moving train and, if injured thereby, he must, in order to recover against the carrier, prove a reasonable excuse for the act. So held in *Shannon v. Boston & A. R. Co.*, 78 Me. 52, 2 Atl. 678.

Absence of Anything to Create Excitement.—In the absence of anything to create excitement or cause alarm, the attempt to leave a car while the train is in motion, by jumping from the steps of the car to the platform of the station, is prima facie evidence of negligence on the part of the passenger. So held in *McDonald v. Boston & Maine R. Co.* (Me.), 2 Am. & Eng. R. Cas., N. S., 293.

D. Question for Jury.

However, according to the second general rule stated in our note it is, in almost every instance, for the jury to determine from all the circumstances of the act, whether or not a steam railroad passenger was negligent in leaving a train while it was in motion.

United States.—*Rutledge v. New Orleans, etc., R. Co.* (C. C. A.), 129 Fed. Rep. 94, 11 R. R. R. 488, 34 Am. & Eng. R. Cas., N. S., 488.

Alabama.—*Kansas City, etc., R. Co. v. Matthews* (Ala.), 17 R. R. R. 79, 40 Am. & Eng. R. Cas., N. S., 79, 39 So. 207.

California.—*Carr v. Eel River, etc., R. Co.*, 98 Cal. 366, 33 Pac. 213.

Georgia.—*Coursey v. Southern Ry. Co.* (Ga.), 21 Am. & Eng. R. Cas., N. S., 412, 38 S. E. 866.

Illinois.—*Baltimore, etc., R. Co. v. Mullen* (Ill.), 20 R. R. R. 6, 43 Am. & Eng. R. Cas., N. S., 6, 75 N. E. 471, 475.

Indiana.—*Louisville & N. W. Co. v. Crunk*, 119 Ind. 542, 21 N. E. 31; *Harris v. Pittsburg, etc., R. Co.*, 32 Ind. App. 600.

Kansas.—*Atchison, etc., R. Co. v. Hughes*, 55 Kan. 491, 2 Am. & Eng. R. Cas., N. S., 248, 40 Pac. 919.

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Maine.—*Shannon v. Boston & A. R. Co.*, 78 Me. 52, 2 Atl. 678.

Maryland.—*New York, etc., R. Co. v. Coulbourne*, 69 Md. 360, 16 Atl. 208.

Michigan.—*Strand v. Chicago, etc., Ry. Co.*, 64 Mich. 216, 31 N. W. 184.

Missouri.—*Clotworthy v. Hannibal, etc., R. Co.*, 80 Mo. 220, 21 Am. & Eng. R. Cas. 371; *Doss v. Missouri, etc., R. Co.*, 59 Mo. 27, 8 Am. Ry. Rep. 462; *Jackson v. St. Louis, etc., Ry. Co.*, 29 Mo. App. 495; *Leslie v. Wabash, etc., Ry. Co.*, 88 Mo. 50, 26 Am. & Eng. R. Cas. 229; *McDonald v. Kansas City & I. R. Co. (Mo.)*, 29 S. W. 848; *Newcomb v. New York Cent., etc., R. Co. (Mo.)* 13 R. R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10, 81 S. W. 1069; *Price v. St. Louis, etc., Ry. Co.*, 72 Mo. 414, 3 Am. & Eng. R. Cas. 365; *Waller v. Hannibal, etc., R. Co.*, 83 Mo. 608.

Pennsylvania.—*Johnson v. West Chester, etc., R. Co.*, 70 Pa. St. 357; *Pennsylvania R. Co. v. Lyons*, 129 Pa. St. 113, 2 Am. & Eng. R. Cas., N. S., 259, 18 Atl. 759; *Victor v. Pennsylvania R. Co.*, 164 Pa. St. 195, 30 Atl. 381.

Rhode Island.—*Aguilino v. New York, etc., R. Co. (R. I.)*, 14 Am. & Eng. R. Cas., N. S., 314.

Erroneous Charge.—A charge which takes away from the consideration of the jury the question whether a passenger is guilty of negligence in jumping from a moving train is erroneous. See held in *Covington v. Western & A. R. Co.*, 81 Ga. 273, 6 S. E. 593.

Jump from Train Moving Five Miles an Hour.—In *New York, etc., R. Co. v. Coulbourne*, 69 Md. 360, 16 Atl. 208, it is held that jumping from a car moving at the rate of five miles an hour, by one rightfully therein, is not such negligence on his part as will, in itself, preclude his right to recover for an injury thereby sustained, but that all the facts and circumstances of the case must be left to the consideration of the jury, and it is for them to determine whether the person, in jumping from the car, acted as a reasonably cautious man would do under like circumstances.

E. Question of Law.

But the evidence may make the contributory negligence of the passenger in leaving a moving train so glaringly appear that the court will be under the duty to give a peremptory instruction for the defendant carrier. *Shannon v. Boston & A. R. Co.*, 78 Me. 52, 2 Atl. 678; *Morrison v. Erie Ry. Co.*, 56 N. Y. 302, 6 Am. Ry. Rep. 166; *Brown v. Barnes*, 151 Pa. St. 562, 25 Atl. 144.

Question of Law in Extreme Case.—Whether or not a passenger had a reasonable excuse for jumping off a moving train is usually a question for the jury, but an extreme case either way may be determined by the court. *Shannon v. Boston & A. R. Co.*, 78 Me. 52, 2 Atl. 678.

After Two Other Passengers Had Been Thrown Down in Alighting.—In *Brown v. Barnes*, 151 Pa. St. 562, 25 Atl. 144, it appeared

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that deceased attempted to alight from a train after it had begun to move and after two other passengers upon the platform of the same car had been thrown down in alighting, in consequence of the motion of the train. It was held that deceased in attempting to alight under the circumstances was guilty of contributory negligence which justified binding instructions for defendant.

F. Conduct of Reasonably Prudent Person the Test.

The test to be applied by the jury in determining whether a passenger was negligent in leaving a moving train is whether a reasonably careful and prudent person would have been willing to take the same risk under the same circumstances.

Alabama.—*Central R. & B. Co. v. Miles*, 88 Ala. 256, 6 So. 696; *Kansas City, etc., R. Co. v. Matthews* (Ala.), 17 R. R. R. 79, 40 Am. & Eng. R. Cas., N. S., 79, 39 So. 207.

California.—*Carr v. Eel River, etc., R. Co.*, 98 Cal. 366, 33 Pac. 213.

Georgia.—*Sanders v. Southern Ry. Co.*, 107 Ga. 132, 32 S. E. 840.

Kansas.—*Atchison, etc., R. Co. v. Hughes*, 55 Kan. 491, 40 Pac. 919, 2 Am. & Eng. R. Cas., N. S., 248.

Maryland.—*New York, etc., R. Co. v. Coulbourne*, 69 Md. 360, 16 Atl. 208.

Massachusetts.—*Brown v. New York, etc., R. Co.* (Mass.), 3 R. R. 143, 26 Am. & Eng. R. Cas., N. S., 143, 63 N. E. 941.

Michigan.—*Jacob v. Flint & P. M. R. Co.*, 105 Mich. 450, 63 N. W. 502.

Missouri.—*Kelly v. Hannibal & St. J. R. Co.*, 70 Mo. 604; *Leslie v. Wabash, etc., Ry. Co.*, 88 Mo. 50, 26 Am. & Eng. R. Cas., 229; *Price v. St. Louis, etc., Ry. Co.*, 72 Mo. 414, 3 Am. & Eng. R. Cas. 365; *Weber v. Kansas City, etc., Ry. Co.*, 100 Mo. 194, 12 S. W. 804.

New York.—*Murphy v. Rome, etc., R. Co.*, 32 N. Y. St. Rep. 381, 10 N. Y. Supp. 354, 56 Hun. 645.

North Carolina.—*Johnson v. Atlanta, etc., R. R.*, 130 N. Car. 488; *Lambeth v. North Carolina R. Co.*, 66 N. Car. 494.

Texas.—*Galveston, H. & S. A. Ry. Co. v. Smith*, 59 Tex. 403.

Wisconsin.—*Delamaty v. Milwaukee, etc., R. Co.*, 24 Wis. 578.

Canada.—*Keith v. Ottawa, etc., Ry. Co.*, 5 Ont. L. R. 116.

Slowly Moving Train—Effect of Passenger's Mere Apprehension of Danger.—In *Sanderson v. Missouri Pac. Ry. Co.*, 64 Mo. App. 655, it is held that the fact that the passenger may apprehend possible danger of injury in getting off a moving train will not prevent a recovery for injuries thereby received, if the train was moving slowly and the passenger acted as a prudent person would have done under similar circumstances; and the mere knowledge that he is in danger of falling in attempting to so alight does not constitute contributory negligence.

Obvious Danger from Rapid Motion—Without Direction of Conductor.—It was not error to charge that if, at the time in question, it was obviously dangerous for the passenger to alight, on account

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of the rapid motion of the train, and he did so without the direction of the conductor, if the circumstances from such rapid motion would make it likely, or seem likely to him, as an ordinary prudent man, that it would be dangerous to do so, the plaintiff would not be entitled to recover. So held in *Sanders v. Southern Ry. Co. (Ga.)*, 14 Am. & Eng. R. Cas., N. S., 281.

G. Use of Proper Care While Making Attempt.

Of course, the mere fact that a passenger exercises the proper degree of care for his own safety while leaving a moving train will not give him a right to recover against the carrier if the attempt to alight was itself negligent. *Cousins v. Lake Shore, etc., Ry. Co.*, 96 Mich. 386, 56 N. W. 14.

In *Cincinnati, etc., R. Co. v. Dufrain*, 36 Ill. App. 352, it is held that it is negligence for a passenger to alight from a moving train, and the fact that she used ordinary care in so alighting will not entitle her to recover for injuries thereby received.

2. STREET CARS.**A. Not Negligence Per Se.**

According to the rule prevailing in almost all common-law jurisdictions, it is not negligence per se for a passenger to alight from a moving street car.

Alabama.—*Birmingham, etc., Co. v. Dickerson (Ala.)*, 29 R. R. R. 693, 52 Am. & Eng. R. Cas., N. S., 693, 45 So. 695; *Birmingham, etc., Co. v. Harden (Ala.)*, 30 R. R. R. 655, 53 Am. & Eng. R. Cas., N. S., 655, 47 So. 327; *Birmingham Ry., etc., Co. v. Landrum (Ala.)*, 28 R. R. R. 593, 51 Am. & Eng. R. Cas., N. S., 593, 45 So. 198.

Colorado.—*Posten v. Denver Tramway Co.*, 11 Colo. App. 187, 53 Pac. 391.

Delaware.—*Betts v. Wilmington City Ry.*, 5 R. R. R. 602, 28 Am. & Eng. R. Cas., N. S., 602.

Illinois.—*Chicago City Ry. Co. v. Mumford*, 97 Ill. 560, 3 Am. & Eng. R. Cas. 312.

Kentucky.—*Sandlin v. Lexington Ry. Co. (Ky.)*, 30 R. R. R. 498, 53 Am. & Eng. R. Cas., N. S., 498, 110 S. W. 374.

Maryland.—*United Rys. & Elec. Co. v. Rosik (Md.)*, 25 R. R. R. 256, 52 Am. & Eng. R. Cas., N. S., 256; *United Rys. & Elec. Co. v. Weir (Md.)*, 22 R. R. R. 472, 45 Am. & Eng. R. Cas., N. S., 472, 26 Atl. 588.

Minnesota.—*Cody v. Duluth St. Ry. Co. (Minn.)*, 18 R. R. R. 117, 41 Am. & Eng. R. Cas., N. S., 117, 102 N. W. 397.

Missouri.—*Dawson v. St. Louis Transit Co.*, 102 Mo. App. 277, 76 S. W. 689; *Duncan v. Wyatt Park Ry. Co.*, 48 Mo. App. 659.

New Jersey.—*New Jersey Traction Co. v. Gardner*, 9 Am. & Eng. R. Cas., N. S., 843, 60 N. J. L. 571, 38 Atl. 669.

New York.—*Nettlestadt v. Ninth Avenue R. Co.*, 32 How. Pr. (N. Y.), 428, 4 Rob. 377; *Munroe v. Third Ave. R. Co.*, 18 J. & S. (N.

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Y.) 114; *Patterson v. Westchester Elec. R. Co.*, 26 N. Y. App. Div. Rep. 336, 49 N. Y. 79.

Utah.—*Paul v. Salt Lake City R. Co.* (Utah), 19 R. R. R. 45, 22 Am. & Eng. R. Cas., N. S., 45, 83 Pac. 563.

Virginia.—*Newport News, etc., Co. v. McCormick* (Va.), 22 R. R. R. 838, 45 Am. & Eng. R. Cas., N. S., 838, 56 S. E. 281.

Failure of Conductor to Stop Car at Usual Stopping Place—Erroneous Instruction.—In *Paul v. Salt Lake City R. Co.* (Utah), 19 R. R. R. 45, 22 Am. & Eng. R. Cas., N. S., 45, 83 Pac. 563, an action for injuries to a passenger sustained in alighting from a moving street car, the court charged that though the conductor failed to stop the car when requested while it was at its usual stopping place, such failure did not justify plaintiff in attempting to leave the car while in motion; and if she did so she assumed the risk, and her injury by reason of such attempt was due to contributory negligence barring a recovery; also, that if plaintiff, "without waiting for the car to come to a full stop, undertook to and did step from the car while in motion, and as a natural result thereof was injured, she could not recover." It was held that such instructions were erroneous as in effect charging that plaintiff was guilty of contributory negligence as a matter of law if she attempted to alight from a moving street car.

From Car Moving Very Slowly—Struck by Car on Other Track.—In *Birmingham Ry., etc., Co. v. Landrum* (Ala.), 28 R. R. R. 593, 51 Am. & Eng. R. Cas., N. S., 593, 45 So. 198, an action for injury to one alighting from a street car and struck by a passing car while attempting to cross tracks behind the car from which he alighted, an instruction that, if he alighted before the car reached his station and while it was in motion, he could not recover, was properly refused, since under it he was not entitled to recover though he alighted just before the car stopped and while it was moving very slowly.

From Car Running Very Slowly and Smoothly.—In *United Rys. & Elec. Co. v. Weir* (Md.), 22 R. R. R. 472, 45 Am. & Eng. R. Cas., N. S., 472, 26 Atl. 588, it is held that a passenger was not guilty of contributory negligence, per se, in attempting to alight from a street car while it was moving very slowly and smoothly, but whether her act in so doing was negligence was a question for the jury under all the facts in the case.

From Slowly Moving Horse Car.—It is not contributory negligence, per se, to alight from a slowly moving horse car; and when personal injury results from so doing it should be left to the jury to determine, from all the evidence, whether the proximate cause of the accident was the plaintiff's own negligence, or want of proper care in the control and management of the car. So held in *New Jersey Traction Co. v. Gardner*, 9 Am. & Eng. R. Cas., N. S., 843, 60 N. J. L. 571, 38 Atl. 669.

From Moving Car at Right Angles—Speed.—In *Birmingham, etc., Co. v. Harden* (Ala.), 30 R. R. R. 655, 53 Am. & Eng. R. Cas., N. S.,

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655, 47 So. 327, it is held that it is not negligence in all cases, as a matter of law, for a passenger to step off a moving street car at right angles therewith, since the speed of the car must materially influence the determination of the question.

Stepping in Opposite Direction to Movement of Car—Plea—Speed.—In *Birmingham, etc., Co. v. Dickerson* (Ala.), 29 R. R. R. 693, 52 Am. & Eng. R. Cas., N. S., 493, 45 So. 659, it is held that it is not necessarily negligence for a passenger to alight from a moving car, even by stepping in the opposite direction to the movement of the car, and a plea of contributory negligence in so doing, which does not show the speed of the car is insufficient.

Contra.—It is contributory negligence for a passenger to alight from a moving street car. So held in *Neff v. Harrisburg Traction Co.*, 192 Pa. St. 501, 43 Atl. 1020.

Voluntarily Alighting.—A passenger on a street car cannot recover for injuries sustained in consequence of her voluntarily alighting from the car when it was in motion. So held in *Joyce v. Los Angeles Ry. Co.* (Cal.), 20 R. R. R. 66, 43 Am. & Eng. R. Cas., N. S., 66, 82 Pac. 204.

Stepping from Car before It Has Stopped.—So in *Harmon v. Washington, etc., R. Co.*, 6 Mackey (D. C.), 57, an action against a street railway for personal injuries, it is held that the defendant carrier must prevail if it appear that the passenger signaled the conductor to stop the car, the latter rang the bell for that purpose and the car immediately began to slow down and that plaintiff, without waiting for the car to stop, stepped from the car while it was still moving and was injured in consequence.

Stepping from Car before It Stopped—Judgment for Plaintiff Not Permitted to Stand.—And in *Lynch v. Interurban St. Ry. Co.*, 88 N. Y. Supp. 935, an action for personal injuries received by a passenger while alighting from a street car, it appeared that they were sustained by stepping off the car before it stopped. It was held that a judgment for plaintiff should not be permitted to stand, because of such contributory negligence on his part.

Alighting from Still Moving Car before Being Invited.—And where, in an action for injuries to a passenger on a street car, there was evidence that he attempted to get off while the car was still moving, and before he was invited to alight, it was error to refuse to charge that if the proximate cause of his injury was so alighting before the car stopped, he could not recover, whether he exercised due care or not. So held in *Knoxville Traction Co. v. Carroll* (Tenn.), 13 R. R. R. 707, 36 Am. & Eng. R. Cas., N. S., 707, 82 S. W. 313.

Stepping from Open Car When It Was Slowing Down, in Presence of Conductor.—So in *Cosgrove v. Consolidated Ry. Co.* (Conn.), 29 R. R. R. 679, 52 Am. & Eng. R. Cas., N. S., 679, 68 Atl. 249, it appeared that as defendant's open trolley car was approaching a customary stopping place, and slowing down to make the stop, plaintiff, a passenger, stepped on the running board, and then to the ground, and

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was injured. Defendant's conductor, who had frequently seen plaintiff alight at the same place, saw his movements at the time, and gave him no warning, it was held that he was guilty of contributory negligence.

Woman Alighting of Own Volition—Insufficient Seat Guards—Car Unduly Crowded—Speed—Rough Track.—And in an action for the death of a passenger, it was held that it was proper to charge that if deceased of her own volition got off from the car while it was in motion, and in consequence of such act, was thrown to the ground and sustained the injury from which she died, plaintiff could not recover though the car had not sufficient guards to the seats or was unduly crowded or was running at an unusual rate of speed, or though the track was rough and caused jerks and shocks of the car as it proceeded over the same. *Van Horn v. St. Louis Transit Co. (Miss.)*, 21 R. R. R. 160, 44 Am. & Eng. R. Cas., N. S., 160, 95 S. W. 326.

Agreement of Conductor to Stop at Crossing—Proximate Cause—Assumption of Risks.—And in *White v. West End St. Ry. Co.*, 165 Mass. 522, 43 N. E. 298, it is held that a passenger on a street car who sustains injuries in stepping from the car while it is in motion cannot recover therefor, either in contract, on the ground that the conductor agreed to stop at the crossing, his injuries not being the natural and proximate consequences of the failure to stop there, or in tort, if the circumstances disclose that he assumed the risks from so alighting from the car.

B. Question for Jury.

And it is generally a question for the jury to determine, from all the circumstances, whether such conduct constitutes contributory negligence.

Alabama.—*Birmingham Ry. & Elec. Co. v. James*, 121 Ala. 120, 25 So. 847; *Birmingham Ry., etc., Co. v. Willis (Ala.)*, 16 R. R. R. 523, 39 Am. & Eng. R. Cas., N. S., 523, 38 So. 1016; *Watkins v. Birmingham Ry. & Elec. Co.*, 120 Ala. 147, 24 So. 392.

Colorado.—*Posten v. Denver Tramway Co.*, 11 Colo. App. 187, 53 Pac. 391.

Illinois.—*Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1; *Chicago Union Traction Co. v. Olsen (Ill.)*, 71 N. E. 985, 15 R. R. R. 49, 38 Am. & Eng. R. Cas., N. S., 49; *Bloomington & N. Ry. v. Zimmerman*, 101 Ill. App. 184.

Indiana.—*Indianapolis St. R. Co. v. Hockett*, 159 Ind. 677, 66 N. E. 39.

Iowa.—*Root v. Des Moines City Ry. Co.*, 113 Iowa, 676, 83 N. W. 904.

Maryland.—*United Rys. & Elec. Co. v. Weir (Md.)*, 22 R. R. R. 472, 45 Am. & Eng. R. Cas., N. S., 472, 62 Atl. 588.

Missouri.—*Dawson v. St. Louis Transit Co.*, 102 Mo. App. 277, 76 S. W. 689.

New Jersey.—*New Jersey Traction Co. v. Gardner*, 60 N. J. L. 571; 38 Atl. 669, 9 Am. & Eng. R. Cas., N. S., 843.

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New York—*Munroe v. Third Ave. R. Co.*, 18 J. & S. (N. Y.) 114; *Willis v. Metropolitan St. R. Co.*, 63 N. Y. App. Div. 332.

Slowly Moving Car.—Whether a passenger is guilty of contributory negligence in alighting from a slowly moving street car is a question for the jury. So held in *Birmingham Ry., etc., Co. v. Willis (Ala.)*, 16 R. R. R. 523, 39 Am. & Eng. R. Cas., N. S., 523, 38 So. 1016.

C. Conduct of Reasonably Prudent Person.

And, as in the case of steam railroad passengers, the test to be applied is the conduct of a reasonably careful and prudent man under the same circumstances. *Birmingham Ry. & Elec. Co. v. James*, 121 Ala. 120, 25 So. 847; *Sweet v. Birmingham Ry. & Elec. Co. (Ala.)*, 22 R. R. R. 468, 45 Am. & Eng. R. Cas., N. S., 468; *Watkins v. Birmingham Ry. & Elec. Co.*, 120 Ala. 147, 24 So. 392; *Waller v. Wilmington City Ry. Co. (Del. Sup'r Ct.)*, 21 R. R. R. 727, 44 Am. & Eng. R. Cas., N. S., 727, 61 Atl. 874; *Burke v. Bay City Traction, etc., Co. (Mich.)*, 22 R. R. R. 758, 45 Am. & Eng. R. Cas., N. S., 758, 110 N. W. 524; *Lee v. Elizabeth, etc., Ry. Co. (N. J.)*, 8 R. R. R. 923, 31 Am. & Eng. R. Cas., N. S., 923, 55 Atl. 106.

In *Sweet v. Birmingham Ry. & Elec. Co. (Ala.)*, 22 R. R. R. 468, 45 Am. & Eng. R. Cas., N. S., 468, it is held that a passenger is guilty of contributory negligence in attempting to get off a moving car at a time when a reasonably prudent person similarly situated would not attempt to alight.

3. STEAM RAILROAD TRAINS.

A. More Particular Statement of Prevailing Doctrine.

As already stated, according to the greater weight of authority, the question whether a passenger is guilty of contributory negligence in leaving a train while it is moving is to be determined from all the circumstances and conditions under which the act of the passenger is committed, such as the speed of the train, darkness, whether the passenger was acting under the command or advice of a trainmen, or whether the danger of making the attempt would have been obvious to a man of ordinary sense and prudence.

Alabama.—*Kansas City, etc., R. Co. v. Matthews (Ala.)*, 17 R. R. R. 79, 40 Am. & Eng. R. Cas., N. S., 79, 39 So. 207.

California.—*Carr v. Eel River, etc., R. Co.*, 98 Cal. 366, 33 Pac. 213.

Indiana.—*Louisville & N. W. Co. v. Crunk*, 119 Ind. 542, 21 N. E. 31; *Pittsburg, etc., Ry. Co. v. Gray*, 28 Ind. App. 588, 4 R. R. R. 120, 27 Am. & Eng. R. Cas., N. S., 120, 64 N. E. 39.

Kansas.—*Atchison, etc., R. Co. v. Hughes*, 55 Kan. 491, 40 Pac. 919, 2 Am. & Eng. R. Cas., N. S., 248.

Louisiana.—*McMichael v. Illinois Cent. R. Co. (La.)*, 7 R. R. R. 140, 30 Am. & Eng. R. Cas., N. S., 140, 34 So. 110.

Maine.—*Shannon v. Boston & A. R. Co.*, 78 Me. 52, 2 Atl. 678.

Maryland.—*Cumberland Valley R. Co. v. Maugans*, 61 Md. 53, 18 Am. & Eng. R. Cas., 182.

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Massachusetts.—*La Pointe v. Boston & M. R. R.* (Mass.), 5 R. R. R. 464, 28 Am. & Eng. R. Cas., N. S., 464, 65 N. E. 44.

Michigan.—*Strand v. Chicago, etc., Ry. Co.*, 64 Mich. 216, 31 N. W. 184.

Missouri.—*Clotworthy v. Hannibal, etc., R. Co.*, 80 Mo. 220, 21 Am. & Eng. R. Cas. 371; *Doss v. Missouri, etc., R. Co.*, 59 Mo. 27, 8 Am. Ry. Rep. 462; *Jackson v. St. Louis, etc., Ry. Co.*, 29 Mo. App. 495; *Leslie v. Wabash, etc., Ry. Co.*, 88 Mo. 50, 26 Am. & Eng. R. Cas. 229; *Newcomb v. New York Cent., etc., R. Co. (Mo.)*, 13 R. R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10, 81 S. W. 1069; *Price v. St. Louis, etc., Ry. Co.*, 72 Mo. 414, 3 Am. & Eng. R. Cas. 365; *Straus v. Kansas City, etc., R. Co.*, 75 Mo. 185, 6 Am. & Eng. R. Cas. 384; *Taylor v. Missouri Pac. Ry. Co.*, 26 Mo. App. 336; *Waller v. Hannibal, etc., R. Co.*, 83 Mo. 608; *Weber v. Kansas City, etc., Ry. Co.*, 100 Mo. 194, 12 S. W. 804.

Nebraska.—*Chicago, B. & Q. R. Co. v. Hyatt (Neb.)*, 4 Am. & Eng. R. Cas., N. S., 44.

North Carolina.—*Morrow v. Atlanta & C. A. L. Ry. Co. (N. Car.)*, 10 R. R. R. 290, 33 Am. & Eng. R. Cas., N. S., 290, 46 S. E. 12.

Rhode Island.—*Aguilino v. New York, etc., R. Co. (R. I.)*, 14 Am. & Eng. R. Cas., N. S., 314.

South Carolina.—*Doolittle v. Southern Ry.*, 62 S. Car. 130.

Texas.—*Galveston, H. & S. A. Ry. Co. v. Smith*, 59 Tex. 403.

In *Louisville & N. W. Co. v. Crunk*, 119 Ind. 542, 21 N. E. 31, it is held that there is no conclusive legal presumption that a passenger who voluntarily alights from a moving train is guilty of such contributory negligence as will defeat an action for injuries thereby sustained, but the question whether such conduct is negligence is to be determined by the jury upon a consideration of the rate of speed the train had acquired, the place of, and all the circumstances connected with the act of alighting.

Speed—Day or Night—Distance to Ground—Age and Condition of Passenger—Command or Encouragement of Carrier's Agent.—It is not negligence per se for a passenger to leave a moving train. Whether it be so in a particular case depends upon the train's speed, the fact whether it is day or night, the distance from the car to the ground or surface upon which the passenger alights, the age and vigor of the passenger, and whether he takes the risk by the command or encouragement of the carrier's agent in charge of the train, or to escape greater peril. So held in *Little Rock & Ft. Smith Ry. Co. v. Atkins*, 46 Ark. 423.

Slowly Moving Train.—The fact that a passenger attempted to alight from a slowly moving train, and sustained injuries in so doing, did not necessarily render him guilty of contributory negligence. So held in *Pittsburg, etc., Ry. Co. v. Gray*, 28 Ind. App. 588, 4 R. R. R. 120, 27 Am. & Eng. R. Cas., N. S., 120, 64 N. E. 39.

Slowly Moving Train.—Whether a passenger is guilty of negligence in alighting from a slowly moving train just as it is leaving the sta-

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tion is a question for the jury. So held in *Newcomb v. New York, etc., R. Co. (Mo.)*, 13 R. R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10, 81 S. W. 1069.

Slowly Moving Train—Negligently Leaving Car Gate Open—Negligently Managing Train.—While it may not be negligence per se to alight from a slowly moving train, it is competent for the jury to find in a given case that such an act constituted such negligence on the part of the passenger as to bar a recovery, notwithstanding that the railroad company was also guilty of negligence in leaving the platform gate open, or otherwise negligently managing the train. So held in *Aguilino v. New York, etc., R. Co. (R. I.)*, 14 Am. & Eng. R. Cas., N. S., 314.

Insufficient Time for Alighting—Motion Almost Imperceptible—Condition of Passenger.—In *Straus v. Kansas City, etc., R. Co.*, 75 Mo. 185, 6 Am. & Eng. R. Cas. 384, an action by a passenger to recover against the carrier for injuries sustained in alighting from a train as it was in the act of moving out from the station, it was held that if insufficient time was allowed plaintiff for alighting, and before he attempted to alight the train was started, and he then jumped from the train while its motion was still so slight as to be almost imperceptible and was injured, it was for the jury to determine from the age and physical condition of plaintiff and the attendant circumstances whether his act was negligent.

Alighting on Left Foot from Train Moving to His Left—Two Miles an Hour.—Whether a passenger was negligent in attempting to alight on his left foot from a train moving to his left at a rate of one or two miles an hour was for the jury. So held in *Kansas City, etc., R. Co. v. Matthews (Ala.)*, 39 So. 207, 17 R. R. R. 79, 40 Am. & Eng. R. Cas., N. S., 79.

Young Man Encumbered with Baggage—Daylight—Slow Speed—Eighteen Inches between Car Step and Station Platform.—In *Cumberland Valley R. Co. v. Maugans*, 61 Md. 53, 18 Am. & Eng. R. Cas. 182, it appeared that a young, strong and active man, in the full possession of all his physical and mental faculties, having a valise containing clothing in his right hand, and a basket of provisions on his left arm, attempted, in broad daylight to leave a slowly moving train, the distance from the lower step of the car to the station platform being only eighteen inches, and in the attempt was injured. It was held that he was not guilty of such negligence as would justify the court in taking the case from the consideration of the jury.

Age and Condition of Passenger—Rash Act.—If from the age, condition of the passenger and other circumstances of the case, the attempt of a passenger to alight from a moving street car is rash and dangerous, it constitutes such contributory negligence as to prevent recovery against the carrier for an injury thereby sustained. So held in *Betts v. Wilmington City Ry. Co. (Del.)*, 5 R. R. R. 602, 28 Am. & Eng. R. Cas., N. S., 602.

Act Obviously and Necessarily Dangerous.—Where a passenger

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knowingly jumps from a moving train, under such circumstances as to render the act obviously and necessarily dangerous and to show a willful disregard of the danger incurred, it will prevent a recovery for the injuries received thereby. So held in *Chicago, B. & Q. R. Co. v. Hyatt* (Neb.), 4 Am. & Eng. R. Cas., N. S., 44.

Jump from Moving Train—Rendered Obviously Dangerous by Circumstances—"Criminal Negligence"—Statute.—Under art. 1, c. 72 Neb. Comp. St., it is not such contributory negligence for a passenger to jump from a moving train as will in every case prevent a recovery, but where the circumstances are such as to render it obviously and necessarily perilous, and to show a willful disregard of the danger incurred thereby, such conduct amounts to "criminal negligence," within the meaning of the act. So held in *Chicago, etc., R. Co. v. Landauer*, 39 Neb. 308, 58 N. W. 434.

Alighting after Assisting Passenger to Board—Speed of Four Miles an Hour Steadily Increasing.—A person who, after boarding a train to assist a passenger to board it, alights from the train while it is traveling at the rate of three or four miles an hour and with its speed steadily increasing is guilty of contributory negligence as a matter of law, precluding a recovery for the injuries thereby sustained. So held in *Morrow v. Atlanta & C. A. L. Ry. Co.* (N. Car.), 10 R. R. R. 290, 33 Am. & Eng. R. Cas., N. S., 290, 46 S. E. 12.

Woman—Nighttime—Encumbrance by Parcel.—In *McMichael v. Illinois Cent. R. Co.* (La.), 7 R. R. R. 140, 30 Am. & Eng. R. Cas., N. S., 140, 34 So. 110, it is held that a lady passenger takes the risk who attempts to alight in the nighttime, with a parcel in her hand, when the car is in motion.

Woman Encumbered with Heavy Bundles—Car Step Two Feet from Ground—Fear of Being Carried Past Station.—In *Toledo, etc., R. Co. v. Wingate*, 143 Ind. 125, 37 N. E. 274, it is held that a woman is guilty of such contributory negligence as will prevent a recovery, in attempting to alight unaided, with heavy bundles in her arm, from a moving train, the step of which is more than two feet from the ground, although she does so in the apprehension that she will be carried past her station.

4. STREET CARS.

A. In General.

And this rule is also applicable to street car passengers. *Posten v. Denver Tramway Co.*, 11 Colo. App. 187, 53 Pac. 391; *Betts v. Wilmington City Ry. Co.* (Del.), 5 R. R. R. 602, 28 Am. & Eng. R. Cas., N. S., 602; *Coursey v. Southern Ry. Co.* (Ga.), 21 Am. & Eng. R. Cas., N. S., 412, 38 S. E. 866; *Cody v. Duluth St. Ry. Co.* (Minn.), 18 R. R. R. 117, 41 Am. & Eng. R. Cas., N. S., 117, 102 N. W. 397; *Duncan v. Wyatt Park Ry. Co.*, 48 Mo. App. 659.

Charge Properly Refused Because Indefinite as to Speed.—In *Cody v. Duluth St. Ry. Co.* (Minn.), 18 R. R. R. 117, 41 Am. & Eng. R. Cas., N. S., 117, 102 N. W. 397, an action against a street railway for in-

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juries to a passenger, a request to charge, that, if plaintiff jumped or stepped off the car while it was in motion, she could not recover, was properly refused, because it was indefinite as to the speed of the car, on which the question of negligence in stepping therefrom would depend.

Slowly Moving Car—Passenger's Age and Condition.—In *Betts v. Wilmington City Ry. Co.* (Del.), 5 R. R. R. 602, 28 Am. & Eng. R. Cas., N. S., 602, it is held that while it may not be negligence per se for a passenger to alight from a slowly moving street car, yet, if, from the age, condition of the passenger, and all other circumstances, such an act would be rash, dangerous or hazardous, then it would amount to negligence, and if the injury resulted from such act the common carrier would not be liable therefor. •

5. RAPIDLY MOVING TRAINS.

There are but few circumstances which will excuse a passenger from leaving a rapidly moving train; and in the absence of proof of the existence of a sufficiently extenuating circumstance such an act constitutes contributory negligence as matter of law.

Georgia.—*Georgia, etc., Ry. Co. v. Hutchins* (Ga.), 48 S. E. 939, 15 R. R. R. 727, 38 Am. & Eng. R. Cas., N. S., 727; *Jarrett v. Atlanta & W. P. R. Co.*, 83 Ga. 347, 9 S. E. 681.

Illinois.—*Illinois Cent. R. Co. v. Able*, 59 Ill. 131, 11 Am. Ry. Rep. 154; *Illinois Cent. R. Co. v. Chambers*, 71 Ill. 519.

Kentucky.—*Louisville & N. R. Co. v. Depp* (Ky.), 33 S. W. 417.

Missouri.—*Leslie v. Wabash, etc., Ry. Co.*, 88 Mo. 50, 26 Am. & Eng. R. Cas. 229; *Weber v. Kansas City, etc., Ry. Co.*, 100 Mo. 194, 12 S. W. 804.

Texas.—*Houston & T. C. Ry. Co. v. Leslie*, 57 Tex. 83, 9 Am. & Eng. R. Cas. 407; *St. Louis S. W. Ry. Co. v. Highnote* (Tex.), 16 R. R. R. 41, 39 Am. & Eng. R. Cas., N. S., 41, 86 S. W. 923

Failure to Give Opportunity to Alight at Station.—If a passenger, though carried past his station without being allowed a reasonable opportunity of alighting from the train, voluntarily leaps from it while it is moving rapidly, or leaves it under circumstances which will necessarily or probably render such act perilous, and is injured thereby, he cannot recover. So held in *Illinois Cent. R. Co. v. Able*, 59 Ill. 131, 11 Am. Ry. Rep. 154.

Alighting before Reaching Station—Twenty Miles an Hour.—In *Louisville & N. R. Co. v. Depp* (Ky.), 33 S. W. 417, it appeared that plaintiff, a passenger, got off the train about 450 yards from his station, while the train was running at the rate of 18 or 20 miles per hour. It was held that his undertaking to leave the car while it was in motion at such rate of speed was negligence per se and barred his right of recovery.

Jumping Off at Station of Destination—Twelve Miles an Hour—Negligence in Failure to Stop, and in Slowing up.—In *Kansas City, etc., Ry. Co. v. Mayes*, 58 Ark. 397, 24 S. W. 1076, it is held that an

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adult passenger of sound mind, who, under no emergency or constraint, jumps off at his station from a train moving at over 12 miles an hour is guilty of such contributory negligence as will prevent recovery for resulting injuries, in an action based upon the trainmen's negligence in failing to stop, and in slowing up at the platform, and thereby inducing him to make the attempt.

Conductor's Agreement to Slacken Up—Alighting without Conductor's Knowledge—Dangerous Speed—Use of Care in Judging Speed.—In *St. Louis S. W. Ry. Co. v. Highnote* (Tex.), 16 R. R. R. 41, 39 Am. & Eng. R. Cas., N. S., 41, 86 S. W. 923, it is held that one riding on a train, under a special agreement with the conductor that the train would slack up enough for him to alight with safety at a certain place, cannot hold the railroad responsible for injuries sustained in alighting from the train at the place agreed upon, where he acted upon his own motion and judgment, without the knowledge or concurrence of the conductor, at a time when the train was going in fact too fast to permit him to alight in safety, although he used ordinary care in judging and determining that it was safe for him to alight.

Invited or Ordered to Alight by Trainmen—Imminent Peril.—Jumping from a rapidly moving train, knowing it to be so moving, where such jumping is not invited or ordered by the agents of the railroad company, or is not done to avoid some apparently threatening peril, is such negligence as will bar a recovery for injuries thereby sustained. So held in *Jarrett v. Atlanta & W. P. R. Co.*, 83 Ga. 347, 9 S. E. 681.

6. RAPIDLY MOVING STREET CARS.

And the same rule is applicable to rapidly moving street cars. *Walker v. Georgia Ry. & Elec. Co.* (Ga.), 16 R. R. R. 654, 39 Am. & Eng. R. Cas., N. S., 654, 50 S. E. 121.

Twenty Miles an Hour—Absence of Knowledge of Rate of Speed—Ordinance Speed.—It is gross negligence to jump from a street car when it is going at a speed of twenty miles an hour, whether or not he knows that the speed is so great, and the fact that an ordinance limits the speed of the car to seven miles an hour is immaterial in this connection. So held in *Masterson v. Macon, etc., R. Co.*, 88 Ga. 436, 14 S. E. 591.

Seventeen Year Old Boy—Not Negligence Per Se.—But in *Wyatt v. Citizens' Ry. Co.*, 55 Mo. 485, it appeared that a boy of seventeen, and of sound mind, jumped or stepped from a rapidly moving street car, and was injured. It was held improper to instruct the jury that such conduct constituted negligence per se, as the question of his negligence in so leaving the car should have been left to the jury.

7. DARKNESS.

And it is, as a general rule, contributory negligence to leave a moving train when darkness makes it impossible for the passenger to distin-

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guish the nature or the condition of the place where he attempts to alight. *Pennsylvania Co. v. Hixon*, 10 Ind. App. 520, 38 N. E. 56; *McMichael v. Illinois Cent. R. Co. (La.)*, 7 R. R. R. 140, 30 Am. & Eng. R. Cas., N. S., 140, 34 So. 110; *Morrison v. Erie Ry. Co.*, 56 N. Y. 302, 6 Am. Ry. Rep. 166; *Rothstein v. Pennsylvania R. Co.*, 171 Pa. 620, 33 Atl. 379; *Oxsher v. Houston, etc., Ry. Co. (Tex. Civ. App.)*, 3 R. R. R. 727, 26 Am. & Eng. R. Cas., N. S., 727, 67 S. W. 550.

Carried beyond Station—Leaving Car Platform with Knowledge That Speed Is Increasing.—It is negligence in a passenger to leap from a train in the dark, when it has passed the station of his destination and is running at an increased rate of speed, to his knowledge, while he is yet upon the car platform, and before he has begun to descend the steps for the purpose of alighting. So held in *Pennsylvania Co. v. Hixon*, 10 Ind. App. 520, 38 N. E. 56.

Boy Jumping from Train, without Care, after Assisting Relatives to Board.—A boy who, after assisting relatives to board a train, walked rapidly out while it was moving, in the dark, and, without taking time to see where he was going, jumped out into space, was negligent, and not entitled to recover for his injuries. So held in *Oxsher v. Houston, etc., Ry. Co. (Tex. Civ. App.)*, 3 R. R. R. 727, 26 Am. & Eng. R. Cas., N. S., 727, 67 S. W. 550.

Attempting to Alight When Train Had Just Started to Move from Station—Failure to Let Go of Hand Rail.—In *Alabama & V. Ry. Co. v. Jones (Miss.)*, 19 R. R. R. 367, 42 Am. & Eng. R. Cas., N. S., 367, 38 So. 545, it is held that where, after a train on which plaintiff was a passenger had started to move east from a station, plaintiff got off on the south side, when it was dark, clinging to the hand rail with his right hand, and was thereby jerked down onto the platform of the station and dragged backward until his grip on the hand rail was loosened, he was guilty of contributory negligence, as a matter of law, precluding a recovery for injuries so sustained.

Carried beyond Station While Asleep—Stop on Bridge—Sudden Movement of Train—Fall through Bridge.—Where a passenger, while asleep, is carried beyond his station, and when the train arrives at a bridge where it stops to take water he gets up, and, without any encouragement from any one connected with the company, goes out of the car on a dark night, and, finding no brakeman, puts out his foot to reach the platform, and there being no platform there, the train gives him a jerk and pulls both feet off the car, and leaves him hanging by one hand, and his weight pulls him loose, and he falls through the bridge, about thirty feet to the ground, his negligence will prevent a recovery for his injuries. So held in *Illinois Cent. R. Co. v. Green*, 81 Ill. 19.

Familiarity with Depot—Train Just Started—Two Miles an Hour—Jury Question.—But in *Kansas City, etc., R. Co. v. Matthews (Ala.)*, 39 So. 207, 17 R. R. R. 79, 40 Am. & Eng. R. Cas., N. S., 79, it is held that whether a person familiar with a depot was negligent in alighting from a train in the nighttime, in a dark place, when the train had

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just started from the depot and was moving at the rate of one or two miles an hour, was for the jury.

Direction of Train Officials—Darkness—Belief as to Stoppage of Train.—And it is not negligence per se to alight from a moving train in the darkness at the direction of the train officials, or in the belief that it has come to a stop. So held in *Baltimore, etc., R. Co. v. Mullen* (Ill.), 20 R. R. R. 6, 43 Am. & Eng. R. Cas., N. S., 6, 75 N. E. 471, 475.

8. BELIEF THAT TRAIN HAS STOPPED.

But a passenger is not negligent, as a matter of law, in leaving a moving train where the circumstances would justify a reasonably intelligent and prudent person in believing that the train has stopped for the purpose of discharging passengers. *Elwood v. Connecticut Ry. & L. Co.*, 77 Conn. 145, 12 R. R. R. 518, 35 Am. & Eng. R. Cas., N. S., 518, 56 Atl. 751; *Baltimore, etc., R. Co. v. Mullen* (Ill.), 20 R. R. R. 6, 43 Am. & Eng. R. Cas., N. S., 6, 75 N. E. 471, 475; *Brooks v. Boston & Maine R. Co.*, 135 Mass. 21, 16 Am. & Eng. R. Cas. 345; *Merritt v. New York, etc., R. Co.*, 162 Mass. 326, 38 N. E. 447; *McAlan v. Trustees*, 43 N. Y. App. Div. Rep. 374, 60 N. Y. S. 176; *Hodges v. Southern Ry. Co.* (N. Car.), 8 Am. & Eng. R. Cas., N. S., 46

Alighting after Dark, without Feeling Train's Motion, at Place Pointed Out by Officials.—In *Baltimore, etc., R. Co. v. Mullen* (Ill.), 20 R. R. R. 6, 43 Am. & Eng. R. Cas., N. S., 6, 75 N. E. 471, 475, it is held that where a passenger was injured in alighting from a train, the fact that it was dark, and that he felt no motion of the train and believed it had stopped, and got off at a place pointed out to him by the officials as a depot, must be considered by the jury.

Alighting after Train Has Resumed Its Motion—Darkness—Absence of Warning.—In *Brooks v. Boston & Maine R. Co.*, 135 Mass. 21, 16 Am. & Eng. R. Cas. 345, it appeared that when the train upon which plaintiff was a passenger reached her destination, the conductor called the name of the station, the train stopped, and several passengers got out at once, without unusual delay, among them the plaintiff, who followed close after the person in front of her; and that when she got off the train was moving, by reason of which she fell and was injured. She testified that she looked when she was stepping off, but that it was so dark she could not see platform, and that she did not look to see whether the train was moving because she felt sure it was still; and there was also evidence that there was no visible object from which it could be determined whether the train was moving or not. It did not appear that there was any warning which the plaintiff could have heard that the train was about to start. It was held that the question whether plaintiff was in the exercise of due care should have been submitted to the jury.

Dimly Lighted Station—Attempting to Alight after Train Has Resumed Its Motion.—In *Merritt v. New York, etc., R. Co.*, 162 Mass. 326, 38 N. E. 447, it is held that it seems that if a passenger on a train,

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which has stopped at a dimly lighted station, steps from the platform of a car to descend to the station platform, after the train has actually started but when he does not know and, by the exercise of ordinary care, cannot know that it has started, and is injured, the fact that the train had so started would not of itself prevent the maintenance of an action for his injuries.

Belief That Train Had Come to Full Stop—Car Gate Open.—In *McAlan v. Trustees*, 43 N. Y. App. Div. Rep. 374, 60 N. Y. S. 176, plaintiff, who had been a passenger on defendant's car, testified that, supposing the car had come to a full stop, she started to get off the rear platform, the gate at the side of which was open, but that the car was still in motion, and in alighting she was thrown to the platform of the station in such a manner as to receive the injuries complained of. It was held that it could not be said, as matter of law, that she was guilty of contributory negligence.

Announcement of Arrival at Station—Motion of Train Imperceptible—Alighting with Other Passengers.—In *Elwood v. Connecticut Ry. & L. Co.*, 77 Conn. 145, 12 R. R. R. 518, 35 Am. & Eng. R. Cas., N. S., 518, 56 Atl. 751, it appears that when the street car in question was approaching its terminus and moving so slowly that the motion was practically imperceptible to the passenger, the conductor called out, "Westport, change for Norwalk," alighted, and began preparing for the return trip, whereupon plaintiff, a woman, believing the car had stopped, stepped off with other passengers, but was thrown by the motion and was injured. It was held that a finding to the effect that defendant had not proved plaintiff's negligence would not be disturbed.

Effect of Warranted Belief That Train Has Stopped.—In *Bartholomew v. New York Cent. & H. R. R. Co.*, 102 N. Y. 716, 7 N. E. 623, the only ground of error alleged by the defendant is the exception taken to the following phrase in the trial judge's charge: "If the train appeared to have stopped, then for all practical purposes and for the consideration of this case, it had stopped." This phrase was followed and explained by this language: "If from the evidence you shall say that when this woman (a passenger) stepped out upon the platform (of the car), the train had stopped, or appeared to persons of ordinary intelligence and observation to have stopped, following, as it did, the conceded announcement, the fact that an announcement had been made that the station had been approached, and by a sudden jerk, of which she had no warning, she was precipitated and received this injury, she has a right of action." It was held there was no error in the portion of the charge excepted to.

Arrival at Station Announced—Vestibule Door Opened by Guard—Failure of Guard to Warn.—But in *Mearns v. Central Railroad*, 163 N. Y. 108, 57 N. E. 292, it appeared that a passenger upon a vestibule train, as it was nearing a station, in the evening, with the vestibule lighted, leisurely prepared himself to leave the train after the guard had called out "All out, Jersey City, last stop," waited half a minute

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for it to reach the station building, and then, after the guard had opened the vestibule door and stepped across to the vestibule of the car ahead, proceeded out into the vestibule, and down the steps to the station platform, in the belief that the train had stopped. It was held that he could not recover damages of the carrier for injuries sustained by reason of the train still being in motion, although the guard gave him no warning or intimation that the train had not stopped. See also *Mearns v. Central, etc., Co.* (C. C. A.), 17 R. R. R. 97, 40 Am. & Eng. R. Cas., N. S., 97, 139 Fed. Rep. 543.

Rebuttal of Presumption of Negligence—Evidence—Belief That Train Was Standing—Burden of Proof.—And when the carrier shows that the passenger was injured by stepping from its running train, the presumption of liability raised by law against the carrier is overthrown, and it then devolves upon the passenger to show some justifiable reason for such action to relieve himself from the imputation of gross negligence; and the supposition or belief of the passenger that the train was standing still when he took the step which injured him is not competent evidence from which the jury may find that the passenger was not negligent unless accompanied by evidence tending to show circumstances rendering the supposition reasonable, or at least excusable, as, in the absence of such evidence, no reasonable mind could honestly say that the passenger was not guilty of gross negligence. So held in *Chicago, etc., R. Co. v. Landauer*, 39 Neb. 803, 58 N. W. 434.

Failure to Look to Ascertain Whether Train Was Moving—Familiarity with Surroundings.—And in an action for injuries sustained by a passenger on alighting at a station from a train after it had started, it was shown that plaintiff had alighted there every day for 35 years, and that it was daylight at the time of the accident. Plaintiff testified that it was a dark and drizzling evening; that he did not look to see if the train was moving; that his sight was good; and that there was nothing to distract his attention. There was a truck and a lamp on the platform within the range of his vision, which would have shown him that the train was in motion, if he had looked. It was held that plaintiff could not recover, because of his lack of due care. *Brown v. New York, etc., R. Co.* (Mass.), 3 R. R. R. 143, 26 Am. & Eng. R. Cas., N. S., 143, 63 N. E. 941.

9. BELIEF THAT STREET CAR HAS STOPPED.

And the same rule applies to street car passengers.

Alighting at Usual Stopping Place after Giving Proper Signal.—It is not negligence, per se, for a street car passenger to attempt to alight at a usual stopping place if he has given the proper signal for the car to stop, and at the time he makes such attempt he believes the car has stopped, though it has not, but is moving so slowly that a prudent person under the same circumstances would alight. So held in *Burke v. Bay City Traction, etc., Co.* (Mich.), 22 R. R. R. 758, 45 Am. & Eng. R. Cas., N. S., 758, 110 N. W. 524.

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Conductor's Announcement That Terminus Had Been Reached—Motion of Car Imperceptible.—A passenger who alighted from an electric car, after the announcement by the conductor that the terminus of the road had been reached, under the belief that the car had stopped, and while its motion was practically imperceptible, was not guilty of contributory negligence, in fact or in law. So held in *Elwood v. Connecticut Ry. & L. Co.*, 77 Conn. 145, 12 R. R. R. 518, 35 Am. & Eng. R. Cas., N. S., 518, 58 Atl. 751.

II. CIRCUMSTANCES WHICH MAY, OR MAY NOT, EXCUSE ACT OF PASSENGER.

1. FAILURE TO STOP TRAIN AT PROPER TIME OR PLACE.

This does not give the passenger the right to alight while the train is in motion, even though such failure was negligent. *Illinois Cent. R. Co. v. Lutz*, 84 Ill. 598; *Dougherty v. Chicago, etc., R. Co.*, 86 Ill. 467, 17 Am. Ry. Rep. 489; *Lake Shore, etc., Ry. Co. v. Bangs*, 47 Mich. 470, 11 N. W. 276; *Kelly v. Hannibal & St. J. R. Co.*, 70 Mo. 604; *Chicago, etc., R. Co. v. Martelle (Neb.)*, 4 R. R. R. 872, 27 Am. & Eng. R. Cas., N. S., 872, 91 N. W. 364.

Jumping from Train at Point Three Miles beyond Station—Fifteen Miles an Hour.—The fact that the carrier fails to stop its train at a station where it has contracted to leave a passenger does not excuse the latter's conduct in leaping from the train about three miles beyond, while it is running at the rate of fifteen miles an hour; and if he does so leave the train and is injured thereby, he cannot recover for his injuries. So held in *Dougherty v. Chicago, etc., R. Co.*, 86 Ill. 467, 17 Am. Ry. Rep. 489.

Jumping from Train in Rapid Motion—Failure to Notify Trainmen.—A passenger who has been carried past his destination by a train which did not stop for him to alight, and who, without notice to or knowledge of those in charge of the train, simply to avoid being carried to the next station, jumps from the steps of the car to the ground while the train is in rapid motion, and is injured thereby, cannot maintain an action against the railroad company to recover damages therefor. So held in *Chicago, etc., R. Co. v. Martelle (Neb.)*, 4 R. R. R. 872, 27 Am. & Eng. R. Cas., N. S., 872, 91 N. W. 364.

Effect of Desire to Save Family Distress on Account of Passenger's Absence.—It is negligence for a passenger to leap from a moving train for the mere purpose of getting off at a station where the train should stop, but does not do so, even though he takes such course in order to save others distress on account of his absence. So held in *Lake Shore, etc., Ry. Co. v. Bangs*, 47 Mich. 470, 11 N. W. 276.

Effect of Prudence in Making Attempt.—But in *Price v. St. Louis, etc., Ry. Co.*, 72 Mo. 414, 3 Am. & Eng. R. Cas. 365, it is held that whether a railroad which fails to bring its train to a full stop at a station shall be held liable in damages for injuries sustained by a passenger in attempting to get off, depends upon whether, under all the circumstances it was prudent for him to make the attempt.

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Sudden Jerk While Alighting from Moving Train—Proximate Cause.—And in *Turley v. Atlanta, etc., Ry. Co. (Ga.)*, 22 R. R. R. 842, 45 Am. & Eng. R. Cas., N. S., 842, 46 S. E. 78, it is held that where the agent and employees of a railway company negligently fail to bring the train to a stop at a station where a passenger is entitled to leave the train, and the passenger, perceiving that he is about to be carried beyond his destination, attempts to alight from the car at the usual place of doing so at said station, and, while so attempting to alight, is by a sudden jerk thrown from the steps of the car and injured, he is not precluded from the recovery of damages for such injury, unless he was guilty of negligence himself, and his own negligence was the proximate cause of his injuries.

2. FAILURE TO STOP STREET CAR AT PROPER TIME OR PLACE.

And the same rule applies to a passenger on a street car. *Louisville & N. R. Co. v. Lee*, 97 Ark. 325, 12 So. 48; *McDonald v. City Elec. Ry. Co. (Mich.)*, 12 R. R. R. 436, 35 Am. & Eng. R. Cas., N. S., 436, 100 N. W. 592; *Burrows v. Erie Ry. Co.*, 63 N. Y. 556.

In *Newport News, etc., Co. v. McCormick (Va.)*, 22 R. R. R. 838, 45 Am. & Eng. R. Cas., N. S., 838, 56 S. E. 281, it is held that where the operatives of a street car negligently carry a passenger beyond his destination, such conduct does not absolve him from contributory negligence in jumping from the car while it is in motion.

Where, in an action for injuries to a passenger from the alleged premature starting of a street car while he was attempting to alight, defendant claimed that plaintiff attempted to alight while the car was in motion, and before it was brought to a stop, defendant was entitled to an instruction that, while it was defendant's duty to stop the car to afford plaintiff an opportunity to alight, yet its failure to do so would not give plaintiff the right to jump from the moving car. So held in *McDonald v. City Elec. Ry. Co. (Mich.)*, 12 R. R. R. 436, 35 Am. & Eng. R. Cas., N. S., 436, 100 N. W. 592.

Refusal to Stop Horse Car at Request of Young Child—Car in Full Motion—Alighting from Front Platform.—In *Cram v. Metropolitan R. Co.*, 112 Mass. 38, it is held that if the conductor of a horse car refuses to stop the car at the request of a child six and a half years old, such refusal will not of itself justify the child in leaving the car by getting off the front platform while the car is in full motion.

3. WHERE TRAIN OR STREET CAR HAS NOT STOPPED SUFFICIENTLY LONG.

And the same rule is applicable where the train or street car has made too short a stop to allow the passenger an opportunity to alight at his destination. Such conduct on the part of the carrier cannot excuse the passenger's failure to exercise reasonable care and prudence for his own safety.

Alabama.—*Birmingham Ry. & Elec. Co. v. James*, 121 Ala. 120, 25

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So. 847; *Watkins v. Birmingham Ry. & Elec. Co.*, 120 Ala. 147, 24 So. 392.

Georgia.—*Atlanta, etc., R. Co. v. Dickerson*, 89 Ga. 455, 15 S. E. 534.

Illinois.—*Illinois Cent. R. Co. v. Able*, 59 Ill. 131, 11 Am. Ry. Rep. 154; *Illinois Cent. R. Co. v. Chambers*, 71 Ill. 519.

Indiana.—*Evansville C. R. Co. v. Duncan*, 28 Ind. 441; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; *Toledo, etc., R. Co. v. Wingate*, 143 Ind. 125, 37 N. E. 274.

Louisiana.—*Walker v. Vicksburg, etc., R. Co.*, 41 La. Ann. 793, 6 So. 916.

Missouri.—*Clotworthy v. Hannibal, etc., R. Co.*, 80 Mo. 220, 21 Am. & Eng. R. Cas. 371; *Kelly v. Hannibal & St. J. R. Co.*, 70 Mo. 604.

New York.—*Morrison v. Erie Ry. Co.*, 56 N. Y. 302, 6 Am. Ry. Rep. 166.

Texas.—*Houston & T. C. Ry. Co. v. Leslie*, 56 Tex. 83, 9 Am. & Eng. R. Cas., 407.

Wisconsin.—*Jewell v. Chicago, etc., Ry. Co.*, 54 Wis. 610, 12 N. W. 83.

Leap from Train.—In *Atlanta, etc., R. Co. v. Dickerson*, 89 Ga. 455, 15 S. E. 534, it is held that if a passenger voluntarily leaps from a train while it is moving and is injured thereby, he cannot, as a general rule, recover of the carrier, although the train might not have been stopped at the station long enough to give him a reasonable opportunity to get off while it was standing.

Starting after Passenger Has Reached Car Platform.—In *Jewell v. Chicago, etc., Ry. Co.*, 54 Wis. 610, 12 N. W. 83, it is held that one who passed out of a car and got upon its platform and attempted to step or jump from it while the car was in motion cannot recover for injuries suffered in consequence of such action, even though he had reached his place of destination, and the train, which had previously stopped to permit passengers to alight had not stopped a reasonable length of time for such purpose.

Rapidly Moving Train—Failure to Stop the Statutory Five Minutes.—In *Houston & T. C. Ry. Co. v. Leslie*, 57 Tex. 83, 9 Am. & Eng. R. Cas. 407, it is held that a passenger who leaps from a train, when it is in such rapid motion as to render the act manifestly unsafe, cannot recover for injuries thereby sustained; nor are his rights affected by the fact that the train was not stopped at the depot where he boarded the car the five minutes required by statute whereby he was being carried away without his consent.

Stepping from Slowly Moving Train with Twelve Year Old Daughter under His Arm—Knowledge of Motion—Darkness.—In *Morrison v. Erie Ry. Co.*, 56 N. Y. 302, 6 Am. Ry. Rep. 166, it appeared that plaintiff, an infant twelve years of age in the care of her parents, was a paying passenger on defendant's cars. As the train approached the station where she was to alight, the conductor called out the name of the station and the cars stopped. It was evening and dark, plaintiff and her parents arose to leave, but before they got out of the car,

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the train started and moved slowly by the station. They knowing the train was in motion passed out on the platform of the car and while the train was still moving, and after it had passed the platform of the station, plaintiff's father took her under his arm, stepped from the car, fell, and she was injured. It was held that plaintiff, as matter of law, was guilty of contributory negligence.

Woman in Enfeebled Condition.—In *Louisville & N. R. Co. v. Lee*, 97 Ala. 325, 12 So. 48, it is held that where a female passenger, in an enfeebled condition, though not having had time to leave the train during its stop at her place of destination, leaps from the train after it starts, she is guilty of such contributory negligence as will prevent recovery for her injuries thereby sustained.

Prohibitory Notice Posted in Car Read by Passenger—Train's Motion Resumed before She Reached Car Platform.—In *Burrows v. Erie Ry. Co.*, 63 N. Y. 556, it appeared that a notice was posted in the car in question, which plaintiff read, forbidding passengers from getting on or off moving cars. The train stopped at the station where she wished to alight, but before she got to the platform of the car it started. She attempted to get off with the assistance of another passenger whom she requested to help her, and was injured. It was held that her injury was either owing to the fact that it was impracticable to descend from the car with safety, in which case she was negligent in making the attempt, or was attributable to the negligence or unskillfulness of the one assisting her, for which defendant was not responsible; that while it was the duty of defendant to stop for a sufficient length of time to allow its passengers to alight, yet the violation of this duty did not justify plaintiff in exposing herself to danger by getting off while the cars were in motion.

Failure to Stop Train Long Enough—Slowly Starting.—But in *McSloop v. Richmond & D. R. Co. (C. C.)*, 59 Fed. Rep. 431, it is held that when a train stops at a station without allowing a reasonable time for passengers to alight, one who gets off as it is slowly starting, and is injured thereby, is not guilty of contributory negligence.

Right to Assume That Car Will Stop Long Enough.—And a passenger upon a street car has a right to assume that the car will not be started, after it has stopped to allow passengers to alight, until the driver has used reasonable care to ascertain whether any passenger is in the act of alighting, and that when the car is started it will be with reasonable care, and not in a sudden and violent manner. So held in *Britton v. The Street Railway Co. of Grand Rapids*, 90 Mich. 159, 51 N. W. 276.

4. FAILURE TO GIVE PASSENGER SUFFICIENT TIME FOR ALIGHTING MAY MAKE QUESTION OF HIS CONTRIBUTORY NEGLIGENCE ONE FOR JURY.

See *Covington v. Western & A. R. Co.*, 81 Ga. 273, 275, 6 S. E. 593; *Louisville, etc., R. Co. v. Bean*, 9 Ind. App. 240, 36 N. E. 443; *Nichols v. Dubuque & Dakota Ry. Co.*, 68 Iowa, 732, 28 N. W. 44; *Illinois*

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Cent. R. Co. *v.* Whittaker (Ky.), 57 S. W. 465; Johnson *v.* Atlanta & N. C. R. Co. (N. Car.), 3 R. R. R. 770, 86 Am. & Eng. R. Cas., N. S., 770, 41 S. E. 794; Keith *v.* Ottawa, etc., Ry. Co., 5 Ont. L. R. 116.

Contributory Negligence—Preponderance of Evidence against Plaintiff, Effect of on Finding for Plaintiff.—In Jackson *v.* St. Louis, etc., Ry. Co., 29 Mo. App. 495, it is held that although it may be conceded, in a given case, that the evidence greatly preponderates against the plaintiff on the question of contributory negligence in alighting from a moving train, yet, if there is also substantial testimony tending to show that the train did not stop long enough to enable plaintiff to alight with safety, a finding for the plaintiff cannot be disturbed on account of such preponderating evidence, unless there is a strong legitimate inference of prejudice or mistake on the part of the jury.

Conduct of Reasonable Man—Finding—Review.—In Keith *v.* Ottawa, etc., Ry. Co., 5 Ont. L. R. 116, it appeared that where a train, scheduled to stop at a designated station, did not stop there a sufficient length of time to enable the passengers to alight, and a passenger in attempting to do so after the train had started again fell and was injured, and it was found by the jury on the evidence that he acted as a reasonable man would do under the circumstances, the court of appeals declined to interfere with the finding.

Jumping after Being Carried Less than One Hundred Feet beyond Station—Absence of Evidence as to Speed—Instruction.—In Carr *v.* Eel River, etc., R. Co., 98 Cal. 366, 33 Pac. 213, it is held that if a passenger jumped from a moving train when carried less than one hundred feet beyond her station, after an attempt to alight at the station, where there was not sufficient time to alight with safety, and there is no evidence as to the speed of the train at the time of jumping, it is proper to instruct the jury that if they find that the train did not stop a reasonable length of time to allow the passenger to get off, and she jumped therefrom while the train was in motion, and under such circumstances that an ordinarily cautious, careful, and prudent person would not have apprehended danger therefrom, she was entitled to recover.

5. FEAR OF BEING CARRIED BEYOND DESTINATION.

But the fact that the passenger's act in leaving a moving train was induced by fear of being carried beyond his destination may prevent such conduct from constituting contributory negligence per se.

United States.—McSloop *v.* Richmond & D. R. Co. (C. C.), 59 Fed. Rep. 431.

Alabama.—Central R. & B. Co. *v.* Miles, 88 Ala. 256, 6 So. 696.

Kentucky.—Illinois Cent. R. Co. *v.* Whittaker (Ky.), 57 S. W. 465.

Missouri.—Price *v.* St. Louis, etc., Ry. Co., 72 Mo. 414, 3 Am. & Eng. R. Cas. 365; Sanderson *v.* Missouri Pac. Ry. Co., 64 Mo. App. 655; Taylor *v.* Missouri Pac. Ry. Co., 26 Mo. App. 336.

New York.—Filer *v.* New York Cent. R. Co., 49 N. Y. 47, 3 Am. Ry. Rep. 466.

Tennessee.—Railroad *v.* Mitchell, 98 Tenn. 27, 40 S. W. 72.

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Texas.—Galveston, H. & S. A. Ry. Co. *v.* Smith, 59 Tex. 403; International, etc., Ry. Co. *v.* Satterwhite, 19 Tex. Civ. App. 170, 47 S. W. 41.

Wisconsin.—Delamatyr *v.* Milwaukee, etc., R. Co., 24 Wis. 578.

Decision Required to Be Made Instantly—Reasonableness of Choice.

—In *Filer v. New York Cent. R. Co.*, 49 N. Y. 47, 3 Am. Ry. Rep. 466, it is held that where a passenger upon a railroad, by the wrongful act of the company, is put to an election between leaving the cars while they are in slow motion, or submitting to the inconvenience of being carried by the station where he desires to stop, the carrier is liable for the consequences of the choice, if it is not exercised wantonly or unreasonably; that it is a proper question for the jury whether the adoption of the former alternative is the exercise of ordinary care and prudence, or a rash and reckless exposure to peril; and that under such circumstances, where the decision is required to be made upon the instant, the passenger will not be held to the most rigid accountability for the highest degree of caution.

Choice between Incurring Risk and Being Exposed to Inconveniences—Ordinary Prudence.—In *Delamatyr v. Milwaukee, etc., R. Co.*, 24 Wis. 578, it is held that where a railroad company, by its negligence, compels a passenger to choose between incurring some risk in leaving the train, and being exposed to other inconveniences to which it has no right to expose him, and he is injured in getting off, under circumstances which would not prevent a person of ordinary prudence from doing so, the company is liable.

Slowly Moving Train—Carrier's Fault.—In *Railroad v. Mitchell*, 98 Tenn. 27, 40 S. W. 72, it is held that a passenger can recover for an injury sustained in alighting from a moving train, when, by the carrier's fault, he had no choice but to leave the cars, while in slow motion, or submit to the inconvenience of being carried beyond his destination, if the speed of the train is not such as to indicate danger.

Speed Checked at Station—Ordinary Prudence.—In *Galveston, H. & S. A. Ry. Co. v. Smith*, 59 Tex. 403, it is held that stepping from a moving railway train, which checks its speed at a station, instead of stopping, as required by law, is not necessarily contributory negligence on the part of a passenger; and if in alighting from the train he takes no more risks than a man of ordinary prudence would take under like circumstances, he is not thereby precluded from recovering for injuries sustained.

Whether Required to Submit to Inconvenience and a Further Wrong—Question for Jury.—Where a passenger by the wrongful act of the carrier's employees has been placed in circumstances calling for an election between alighting from a moving train or submitting to an inconvenience and a further wrong, it is a proper question for the jury whether it was prudent and ordinarily careful, or whether it was negligent to so alight. So held in *Sanderson v. Missouri Pac. Ry. Co.*, 64 Mo. App. 655; *Taylor v. Missouri Pac. Ry. Co.*, 26 Mo. App. 336.

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Three Miles an Hour—Informed by Porter That Train Would Not Stop again at Passenger's Destination.—In *Central R. & B. Co. v. Miles*, 88 Ala. 256, 6 So. 696, it is held that where it is shown that a passenger got up from his seat when the cars stopped at his station, and moved towards the door, and, being informed by the porter that the train, which had started again, and was moving at a speed of about three miles an hour, would not stop again, stepped from the platform to the ground, in the direction the train was moving, fell and broke his arm, he is not guilty of contributory negligence as matter of law, but the question is properly submitted to the jury whether, under all the circumstances, his act was that of a reasonably prudent man.

Woman Invited by Station Agent to Sit in Car on Side Track—Car Started without Warning—Jump from Rear of Car.—In *Shannon v. Boston & A. R. Co.*, 78 Me. 52, 2 Atl. 678, it appeared that three women, while waiting for the train to start in which they were to take passage, were invited by the station agent to sit in an empty car on a side track while the waiting room was being cleaned, he assuring them that the car would remain there; but that, without signal or notice of any kind, the train to which the car was attached began to be moved out by an engine, without conductor or brakeman on board; that the women, startled by the sudden and unexpected movement, and apprehensive that they might be carried away from their intended destination, hurried to the rear of the car and jumped out, while the train was still abreast of the platform and apparently moving slowly, and one of them became injured by reason of so jumping. It was held that a verdict in her favor was not so far amiss on such facts as to require it to be set aside.

Passenger Has No Absolute Right to Recover—Dangerous Speed—Proximate Cause.—In *Louisville, etc., Co. v. Collier*, 104 Tenn. 189, 54 S. W. 980, it is held that a passenger has not an absolute right of recovery for injuries sustained in alighting from a railway train which had negligently passed the station of his destination, for if, in consequence of the dangerous speed of the train, his reckless act must be deemed the proximate cause of his injury, he cannot recover, otherwise he may recover, with mitigation of damages, for any negligence on his part.

6. FEAR OF BEING CARRIED BEYOND DESTINATION WILL NOT EXCUSE PASSENGER'S ACT.

Alabama.—*Central R. & B. Co. v. Letcher*, 69 Ala. 106, 12 Am. & Eng. R. Cas. 115.

Arkansas.—*St. Louis, etc., Co. v. Rosenberry*, 45 Ark. 256, 11 S. W. 212.

Illinois.—*Illinois Cent. R. Co. v. Able*, 59 Ill. 131, 11 Am. Ry. Rep. 154; *Illinois Cent. R. Co. v. Chambers*, 71 Ill. 519.

Indiana.—*Pennsylvania Co. v. Hixon*, 10 Ind. App. 520, 39 N. E. 56; *Reibel v. Cincinnati, etc., Ry. Co.*, 114 Ind. 476, 17 N. E. 107; *Toledo, etc., R. Co. v. Wingate*, 143 Ind. 125, 37 N. E. 274.

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Louisiana.—*Damont v. New Orleans, etc.*, R. Co., 9 La. Ann. 441.

Maine.—*McDonald v. Boston & Maine R. Co. (Me.)*, 2 Am. & Eng. R. Cas., N. S., 293.

Massachusetts.—*La Pointe v. Boston & M. R. R. (Mass.)*, 5 R. R. R. 464, 28 Am. & Eng. R. Cas., N. S., 464, 65 N. E. 44.

Missouri.—*Nelson v. Atlantic & Pac. R. Co.*, 68 Mo. 593; *Owens v. Wabash Ry. Co.*, 84 Mo. App. 143.

New York.—*Scully v. New York, etc.*, R. Co., 80 Hun. 197, 30 N. Y. Supp. 61.

Tennessee.—*East Tennessee, etc.*, R. Co. *v. Massengill*, 83 Tenn. (15 Lea.), 328; *Louisville, etc.*, Co. *v. Collier*, 104 Tenn. 189, 54 S. W. 980.

Virginia.—*Richmond, etc.*, R. Co. *v. Morris*, 31 Gratt. 200.*

West Virginia.—*Bogges v. Chesapeake & O. Ry. Co.*, 37 W. Va. 297, 16 S. E. 525.

Wisconsin.—*Brown v. Chicago, etc.*, R. Co., 80 Wis. 162, 49 N. W. 807.

A passenger who jumps from a moving train merely to avoid being carried past the station of his destination, is guilty of such negligence as will preclude a recovery for his injuries thereby sustained. So held in *Nelson v. Atlantic & Pac. R. Co.*, 68 Mo. 593.

Where cars pass their usual stopping place, and to avoid being carried beyond his destination, a passenger, when they are in motion, jumps out, and is thereby injured, he cannot recover against the carrier. So held in *Damont v. New Orleans, etc.*, R. Co., 9 La. Ann. 441.

Although a passenger is being negligently carried past his station, if he alights from the train under circumstances rendering the act imprudent, he assumes the risk. So held in *Owens v. Wabash Ry. Co.*, 84 Mo. App. 143.

In *East Tennessee, etc.*, R. Co. *v. Massengill*, 83 Tenn. (15 Lea.), 328, it is held that when the train fails to stop at the station of destination of a passenger, and he is not directed or induced at the time by act or word of the company's agent to get off, and he does get off, his negligence in so doing will bar recovery for its consequences.

Rapidly Moving Train.—If a passenger leaps from a train in rapid motion, even under the apprehension that it will not stop at his destination, he cannot recover for injuries received thereby. So held in *Illinois Cent. R. Co. v. Chambers*, 71 Ill. 519.

Woman Encumbered with Heavy Bundles.—In *Toledo, etc.*, R. Co. *v. Wingate*, 143 Ind. 125, 37 N. E. 274, it is held that a woman is guilty of such contributory negligence as will prevent a recovery in attempting to alight unaided, with heavy bundles in her arms, from a moving train, the step of which is more than two feet from the ground, although she does so in the apprehension that she will be carried past her station.

On Wrong Train—Conductor's Promise to Slacken Up at Boy's Destination—Jumping after Being Carried beyond.—A boy 17 years old got upon a train without having purchased a ticket to his destination. After the train was in motion, he was informed by the conductor that

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it did not stop at the station to which he desired to go, but the conductor collected his fare to such station, promising him that the train would slacken speed enough as it went by the station to permit him to alight. The train slowed up somewhat when it reached the station, but the boy waited for it to go more slowly, and when it had passed the station and did not appear to be slowing up any more, he jumped from the train and was injured. It was held there was no cause of action. *Schiffler v. Chicago, etc., Ry. Co. (Wis.)*, 8 Am. & Eng. R. Cas., N. S., 122.

Six Miles an Hour—Gross Negligence of Carrier—Statute.—In *Illinois Cent. R. Co. v. Trail (Miss.)*, 25 So. Rep. 863, it appeared that plaintiff boarded defendant's freight train and jumped off at a station, to which he had purchased a ticket, on its failure to stop, while it was running at from six to eight miles per hour, and was injured. It was held that even if the carrier was guilty of gross negligence, under Miss. Code, § 3557, plaintiff's own recklessness was the proximate cause of his injury, and there could be no recovery.

Voluntary Act of Sixteen Year Old Boy.—In *Jones v. Georgia, etc., Ry. Co.*, 103 Ga. 570, 29 S. E. 927, it is held that a passenger, though a minor of about the age of sixteen years, who voluntarily alighted from a moving train, was not entitled to a recovery from the railroad company for injuries thereby sustained, it not appearing that he was directed to do so by any agent or servant of the company, but that, in consequence of a fear that he would be carried beyond his station, he took upon himself the risk of leaving the train in such manner. This is so, even though the train was running at a speed which indicated that it would pass the station without stopping.

Directed by Brakeman to Alight from Next Car Because of Mud—Encumbered with Bundle—Knowledge of Increasing Speed.—In *Victor v. Pennsylvania R. Co.*, 164 Pa. St. 195, 30 Atl. 381, it appeared that plaintiff, a young woman, was a passenger to S. Station. As the train approached the station, its speed was lessened, and the conductor and brakeman each announced: "The next station is S." Plaintiff immediately started from her seat in the back part of the car, and when she reached the front of platform the brakeman asked her to pass on to the next car, stating that she could not alight from the car in which she was without getting into mud and water. When she had reached the middle of the second car the train stopped momentarily to permit another train to discharge its passengers, but started before plaintiff reached the front platform. The conductor and the brakeman were on the platform, on the side of the car from the station, looking forward to ascertain the cause of the stoppage. Plaintiff spoke to them, but they did not see, or hear her. She testified that she then noticed the speed of the train, and thought that she could alight safely, and with a bundle in her hand she stepped from the moving train to the platform. While doing this she observed that the train was moving faster than she had supposed, and, to avoid falling, she took hold of the rail of the car, with her back to the engine, and was

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thrown between the platform and the track and injured. It was held proper to give binding instructions for defendant.

Conductor's Agreement to Stop Train at Certain Point—Speed Only Slackened.—In *Barnett v. East Tennessee, etc., Ry. Co.*, 87 Ga. 766, 13 S. E. 904, it is held that a declaration alleging that the conductor of a passenger train agreed with plaintiff to stop the train to allow him to alight at a point where there was no regular station, but at which defendant's road crossed another railroad at grade; that plaintiff paid his fare to this point; and that on reaching the same, the train only slowed up and did not stop, so that plaintiff, "in order to keep from being carried beyond his destination, was compelled to get from the moving train," and in so doing was seriously injured, does not set forth a cause of action, it appearing from these allegations that plaintiff's injury was caused by his own voluntary act in taking a dangerous risk, if the train was moving so rapidly as to make leaving it unsafe, or if not, that the injury must have resulted from a mere accident, or from plaintiff's own carelessness in getting off.

Carried to Proper Depot—Conductor's Promise to Stop at Certain Street Crossing—Woman Jumping from Train.—Plaintiff was transported to the depot to which she purchased a ticket, but relied on the promise of the conductor to let her get off the train at a certain street crossing, as the train was going back from the depot to the railway yard, and, the train not being stopped at such crossing, she jumped from it while it was in motion and was injured. It was held that nonsuit was properly granted. *Watson v. Georgia Pac. Ry. Co.*, 81 Ga. 476, 7 S. E. 854.

Freight Train Merely Slowed Up at Station—Custom—Jumping after Passing Station—Speed Increasing.—In *Brown v. Chicago, etc., R. Co.*, 80 Wis. 162, 49 N. W. 807, it appeared that a passenger on a freight train wished to get off at a station where the train did not usually come to a full stop but merely slowed up to allow passengers to alight; that finding that the train had passed the station and was increasing its speed, he jumped from the platform of the caboose and was killed. It was held that he was guilty of contributory negligence precluding recovery, although those in charge of the train were also negligent.

Injury to Person on Train on Lawful Business—Jumping When Speed Is Increasing—Failure to Give Statutory Signals.—In *Central R. & B. Co. v. Letcher*, 69 Ala. 106, 12 Am. & Eng. R. Cas. 115, it appeared that plaintiff having boarded defendant's train for a lawful purpose, on its arrival at one of the regular stations of its line, was detained by his business until after the train had started on its journey, and, while the train was moving from the depot, its speed increasing each moment, he, of his own accord, to prevent being carried off, and without notifying any of the trainmen of his presence, and without requesting any of them to slow or stop the train, and without any effort to arrest its progress, walked from the platform of one car to that of another, and with papers in his right hand, descended the steps of

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the car and jumped from the moving train at right angles thereto and fell, and in his fall his left arm was caught under the wheel of the car and crushed. It was held that the injury sustained by the plaintiff was attributable directly and immediately to his own thoughtless and reckless act, and he could not therefore recover, though the defendant was negligent in not giving the signals required by statute, before and at the time the train left the station.

Six to Ten Miles an Hour—Conductor's Signal to Engineer to Stop Seen by Passenger, but Conductor's Warning to Passenger Not Heard—Proximate Cause.—In *Scully v. New York, etc., R. Co.*, 80 Hun. 197, 30 N. Y. Sup. 61, it appeared that plaintiff, a passenger on defendant's train, while it was moving at the rate of from six to ten miles an hour, got down upon the steps of the caboose on which he was riding and jumped from there to the ground, and by falling sustained the injuries of which he complained. At the time of the accident the train had passed the station to which the railroad company had sold the plaintiff a ticket, the conductor of the train stood on the steps at the opposite end of the car, and signalled the engineer to stop, and called to the plaintiff not to alight. The plaintiff saw the signal given, but did not hear the conductor's warning to him. It was held that the proximate cause of the injury was the plaintiff's alighting from the car while the same was in motion; and that, while the carrier was guilty of negligence in not stopping the train at the station, plaintiff could not recover because of his failure to show absence of contributory negligence on his part.

Being Carried Only a Few Yards Further from Home.—The mere fact that a steam railroad passenger is being carried past one station to the next station, only a few yards further from his home, is insufficient to exonerate him from negligence in attempting to alight from a train. *McDonald v. Boston & Maine R. Co. (Me.)*, 2 Am. & Eng. R. Cas., N. S., 293.

Wrongful Refusal to Stop Train.—A railroad company, although it wrongfully refuses to stop its train to allow a passenger to alight at his destination, is not liable for an injury sustained by the passenger in voluntarily jumping from the train while it is moving. So held in *Reibel v. Cincinnati, etc., Ry. Co.*, 114 Ind. 476, 17 N. E. 107.

Veiled Woman Delayed by Bundle—Fall from Car Steps after Starting of Train—Failure to Observe.—Plaintiff started to alight from a train on arriving at her station, but was delayed by a bundle that she carried, and had not gotten onto the platform until after the brakeman had returned into the car and sat down. She went upon the platform and fell off the car steps after the train had started. She wore a veil, but testified that this did not hinder her from seeing well, and the evidence as to how far the train had gone after starting was conflicting, varying from 40 to 60 feet, though plaintiff was picked up at a point 82 feet south of the platform of the station, and it was not disputed that she took no means of observing whether the train had started until she was on the next to the last step of the car. It was

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held that plaintiff was guilty of contributory negligence as matter of law. *La Pointe v. Boston & M. R. R.* (Mass.), 5 R. R. R. 464, 28 Am. & Eng. R. Cas., N. S., 464, 65 N. E. 44.

To Avoid Serious Inconvenience—Speed.—But a passenger may be justified in alighting from a moving train merely to save himself from serious inconvenience, the determination of the question depending upon the speed of the train and the attendant circumstances. *Shannon v. Boston & A. R. Co.*, 78 Me. 52, 2 Atl. 678.

7. NOT CONTRIBUTORY NEGLIGENCE PER SE TO COMPLETE ATTEMPT TO ALIGHT AFTER TRAIN IS MOVING.

Georgia.—*Walters v. Collins Park, etc.*, R. Co., 95 Ga. 519, 20 S. E. 497.

Kansas.—*Atchison, etc., Ry. Co. v. Locwe* (Kan.), 74 Pac. 234.

Maryland.—*United Rys. v. Beidelman*, 95 Md. 480, 52 Atl. 913.

Michigan.—*McCaslin v. Lake Shore, etc., Ry. Co.*, 93 Mich. 553, 53 N. W. 724.

Missouri.—*Dawson v. St. Louis Transit Co.*, 102 Mo. App. 277, 76 S. W. 689; *Sanderson v. Missouri Pac. Ry. Co.*, 64 Mo. App. 655.

Pennsylvania.—*Leggett v. Western, etc., R. Co.*, 143 Pa. St. 39, 21 Atl. 996.

Wisconsin.—*Alford v. Chicago, etc., R. Co.*, 86 Wis. 235, 56 N. W. 743.

Sudden Start When in Act of Stepping Off Car to Lower Step of Station Platform.—In *Sanderson v. Missouri Pac. Ry. Co.*, 64 Mo. App. 655, it is held that if a passenger has reached the lower step of the station platform in alighting from a train and is in the act of stepping off the car onto such platform when the train starts up, he may step off, if he believes he can do so with reasonable safety, without being negligent.

Motion Not Resumed Until Passenger Has Descended Car Steps.—If a passenger, in the exercise of due care, supposes that a train has stopped to allow passengers to get off, and it does not start until she is in the act of descending the steps, the fact that it does start before she leaves it will not of itself prevent a recovery. So held in *Floytrup v. Boston & Maine R. Co.*, 163 Mass. 152, 2 Am. & Eng. R. Cas., N. S., 273, 39 N. E. 797.

Train Started before Woman Reached Car Platform—No Time for Reflection—Question for Jury.—Plaintiff was a passenger on defendant's train. When she had reached her destination, and while attempting to leave the car in which she was riding, and before she had reached the door, the train began to move, and she was compelled to choose instantly, and without time for reflection, as to her course of action; and continued the act of alighting from the train, and in doing so was injured thereby. It was held that such action would not of itself necessarily bar a recovery; and that the question of contributory negligence was properly submitted to the jury. *Chicago, etc., R. Co.*

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v. Winfrey (Neb.), 6 R. R. R. 689, 29 Am. & Eng. R. Cas., N. S., 689, 93 N. W. 526.

Foot on Depot Platform before Motion of Train Is Noticed.—In *Atchison, etc., Ry. Co. v. Locwe* (Kan.), 74 Pac. 234, it is held that where a passenger attempts to alight from a train without having noticed that it is started until her foot is on the depot platform, the question whether she was guilty of contributory negligence is for the jury.

Woman with Baby in Arms Alighting, with Husband's Assistance, When Train Is Started.—In *Alford v. Chicago, etc., R. Co.*, 86 Wis. 235, 56 N. W. 743, it was held that where plaintiff's evidence tended to show that she left her seat, with her baby in her arms, when the train stopped, and proceeded with reasonable diligence to the front platform, and that while in the act of alighting, with her husband's assistance, the train started, and threw her to the ground, it was error to direct a verdict for defendant, although the evidence on its behalf tended to show that she did not start to leave the train until it was again in motion and in fact jumped from the train while it was moving.

Train Starting after Passenger Has Partly Descended Car Steps.—Where a passenger has partly descended the steps of a car when the train starts, it cannot be said, as a matter of law, that he is guilty of negligence if he proceeds to alight, but it is a question for the jury under all the facts. So held in *Nichols v. Dubuque & Dakota Ry. Co.*, 68 Iowa 732, 28 N. W. 44.

Train Started When Passenger Is Alighting with Conductor's Assistance.—In *McCaslin v. Lake Shore, etc., Ry. Co.*, 93 Mich. 553, 53 N. W. 724, it is held that it is not negligence per se for a passenger to alight from a train after it has stopped and he has been invited to alight, and, while doing so, it is started, especially when the brakeman or conductor is standing upon the ground inviting and assisting him, unless the speed of the train is such that the danger is obvious.

8. DIRECTION OR ORDER OF CARRIER'S EMPLOYEE.

A. General Rule.

A passenger is not guilty of contributory negligence per se in alighting from a moving steam railroad train or street car when advised, directed, or commanded to do so by a trainman whom he supposes to be acting within the scope of his authority or power.

Alabama.—*South & North Alabama R. Co. v. Schaeffer*, 75 Ala. 136, 21 Am. & Eng. R. Cas. 405.

Arkansas.—*St. Louis, etc., Ry. Co. v. Leamons* (Ark.), 27 R. R. R. 744, 50 Am. & Eng. R. Cas., N. S., 744; 102 S. W. 363.

District of Columbia.—*Jones v. Baltimore & O. R. Co.*, 4 D. C. App. Cas. 158.

Illinois.—*Baltimore, etc., R. Co. v. Mullen* (Ill.), 20 R. R. R. 6, 43 Am. & Eng. R. Cas., N. S., 6, 75 N. E. 471, 475.

Iowa.—*Lennon v. Chicago & N. W. Ry.* (Iowa), 75 N. W. 671; Pence

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v. Wabash R. Co. (Iowa), 3 R. R. R. 77, 26 Am. & Eng. R. Cas., N. S., 77, 90 N. W. 59.

Kansas.—*Atchison, etc., R. Co. v. Hughes*, 55 Kan. 491, 40 Pac. 919, 2 Am. & Eng. R. Cas., N. S., 248.

Michigan.—*McCaslin v. Lake Shore, etc., Ry. Co.*, 93 Mich. 553, 53 N. W. 724.

Mississippi.—*Fore v. Alabama & V. Ry. Co. (Miss.)*, 21 R. R. R. 694, 44 Am. & Eng. R. Cas., N. S., 694, 39 So. 493.

Missouri.—*McDonald v. Kansas City & I. R. Co. (Mo.)*, 29 S. W. 848; *Newcomb v. New York Cent., etc., R. Co. (Mo.)*, 13 R. R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10, 81 S. W. 1069.

New York.—*Bucher v. New York, etc., R. Co.*, 98 N. Y. 128, 21 Am. & Eng. R. Cas. 361; *Filer v. New Cent. R. Co.*, 68 N. Y. 124; *Schurr v. Houston, etc.*, 10 N. Y. St. Rep. 262.

Pennsylvania.—*Jagger v. People's St. Ry. Co.*, 180 Pa. 436, 36 Atl. 867; *Johnson v. West Chester, etc., R. Co.*, 70 Pa. St. 357; *Pennsylvania R. Co. v. Lyons*, 129 Pa. St. 113, 2 Am. & Eng. R. Cas., N. S., 259, 18 Atl. 759; *Victor v. Pennsylvania R. Co.*, 164 Pa. St. 195, 30 Atl. 381.

South Carolina.—*Cooper v. Georgia, etc., R. Co.*, 61 S. Car. 345.

Moving Train—Danger Not Apparent—Conductor's Advice.—If the act of a passenger in alighting from a moving train under the advice and direction of its conductor is one in the doing of which the danger would not be apparent to a person of reasonable prudence, and the passenger acts under the influence of such advice, given by the conductor in the line of his duty, it is a question for the jury whether the passenger's conduct is excusable. So held in *South & North Alabama R. Co. v. Schaufler*, 75 Ala. 136, 21 Am. & Eng. R. Cas. 405.

Moving Train—Employee's Advice or Direction.—In *Schurr v. Houston, etc.*, 10 N. Y. St. Rep. 262, it is held that where a passenger was advised or directed by one of the employees of the railroad to get off the train, while it was in motion, and in so doing was injured, and the injury was the direct consequence of such action, the question is one to be submitted to the jury, and a nonsuit is improper.

Attempt to Step from Slowly Moving Train—Sudden Jerk—Example of Other Passenger and Brakeman's Direction.—In *Filer v. New York Cent. R. Co.*, 68 N. Y. 124, plaintiff testified that she took passage on defendant's road from Rochester to Fort Plain. As the train approached the latter she passed out, with others, upon the platform. The train was moving slowly, and a passenger who preceded her stepped off the car, and the brakeman said to her, "you had better step off, as we are not going to halt any longer." She then stepped down upon the lower step, and, as she attempted to step down to the ground, the cars gave a sudden jerk, which threw her down, her clothing caught, she was dragged upon the ground and injured. The person she called the brakeman had stood upon the platform, had opened the door and called the stations, and called the Fort Plain station, and, when he gave the direction to her, stood on the platform with his hand on the brakes. She could not recognize the man and the brakeman on

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the train denied plaintiff's statements. It was held that the evidence was sufficient to authorize the submission of the questions of negligence and contributory negligence to the jury, and to sustain a verdict for plaintiff.

Jump from Wrong Train—Three Miles an Hour—Trainman's Advice.—In *Jones v. Baltimore & O. R. Co.*, 4 D. C. App. Cas. 158, it was held that an instruction was not erroneous which stated that if the jury believed that plaintiff purchased in W. a ticket for G. and boarded one of defendant's trains that was pointed out to him by one of defendant's employees, and if, as the train was moving out of the yard at a rate of speed from three to three and a half miles an hour, or at a rate of speed so slow that the danger of getting off would not have been apparent to a reasonable person, and if he was notified by the conductor or brakeman, or any other employee or agent of the defendant at that time on the train, that the train was not going to G. and if he did not want to go to B. he had better get off, and that immediately the plaintiff jumped off and was thereby injured, then it is for the jury to say whether or not the defendant acted negligently, and if the injury was sustained on account thereof, the plaintiff is entitled to recover, unless they further find that the plaintiff by his own negligence contributed to the injury.

Train Speed Slackened—Dark Night—Carried beyond Station While Asleep—Brakeman's Direction.—In *Lennon v. Chicago & N. W. Ry.* (Iowa), 75 N. W. 671, it appeared that a passenger was injured by getting off a moving train on a dark night at the first crossing beyond the station where he should have alighted, but failed to do so because asleep, and that after the train had slackened up and he had been told by the brakeman to get off, he alighted. It was held that it was a question for jury whether he was guilty of contributory negligence.

Jump from Street Car—Four or Five Miles an Hour—Practice of Conductor to Slacken Speed at Such Point to Accommodate Plaintiff.—A passenger on an electric street railway was in the habit of alighting from the car while it was moving at a point where the cars did not stop, and the conductor and motorman would slacken the speed of the car to enable him to do so. While attempting to leap from a car going at a rate of four or five miles an hour at such point he was injured. It was held that the carrier was not bound by the practice of the conductor and motorman in slackening speed; and that the contributory negligence of the passenger was a question for the jury. *Jagger v. People's St. Ry. Co.*, 180 Pa. 436, 36 Atl. 867.

Carried Past Station—Emergency—Directed by Conductor to Jump.—In *Holden v. Great Northern Ry. Co.* (Minn.), 27 R. R. R. 675, 50 Am. & Eng. R. Cas., N. S., 675, 114 N. W. 365, it appeared that plaintiff's intestate was a passenger on defendant's passenger train, and was carried past his station under circumstances likely to disturb his judgment, through no fault of the defendant. The conductor told him that the train was in the yards, going slowly, and he could jump off, and

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directed him to do so. Thereupon he attempted to alight from the moving car and was killed thereby. It was held that the question of his contributory negligence was one of fact to be submitted to the jury.

Injury to Boy in Charge of Stock—Alighting from Moving Train—Conductor's Order.—In *Fore v. Alabama & V. Ry. Co. (Miss.)*, 21 R. R. 694, 44 Am. & Eng. R. Cas., N. S., 694, 39 So. 493, it is held that whether a boy riding on a freight car, in charge of mules, and other freight, was guilty of contributory negligence in alighting from the train while it was in motion, in obedience to an order of the conductor, was a question for the jury.

Jump from Train Moving Faster after Slowing Up—Conductor's Advice and Presence.—In *Cooper v. Georgia, etc., R. Co.*, 61 S. Car. 345, it is held that nonsuit should not have been granted where there was evidence tending to show that the plaintiff was invited by the conductor "to get ready to get off," and went with him to the car step, and when the train, after first slowing up, commenced to go faster, jumped off while the conductor was present, and was injured by the car.

Attempt to Alight from Moving Train before Getting into Car—Fall—Employee's Direction—Apparent Danger.—In *Pence v. Wabash R. Co. (Iowa)*, 3 R. R. 77, 26 Am. & Eng. R. Cas., N. S., 77, 90 N. W. 59, defendant requested an instruction that if plaintiff, having stepped on the first step of one of the cars, and before getting into the car, attempted to get off, whether the train was in motion or not, and fell while attempting to get off, or just after getting off, and was injured, defendant was not liable for the injuries. The court gave this instruction, with the addition, "unless she was directed to get off by an employee of defendant in charge of the train, and obedience to such direction would not lead her into any apparent danger, such as any ordinary person would not assume." It was held that the charge as given was correct.

B. Where Obvious Danger.

But neither the advice nor command of an employee of the carrier will prevent the act of the passenger from constituting contributory negligence if there is danger in alighting which is so apparent that a reasonably prudent person would not incur the risk.

United States.—*Bosworth v. Walker (C. C. A.)*, 83 Fed. Rep. 58; *Whitlock v. Comer (C. C.)*, 57 Fed. Rep. 565.

Alabama.—*South & North Alabama R. Co. v. Schaufler*, 75 Ala. 136, 21 Am. & Eng. R. Cas. 405.

Georgia.—*Sanders v. Southern Ry. Co.*, 107 Ga. 132, 32 S. E. 840.

Indiana.—*Pittsburg, etc., R. Co. v. Gray*, 28 Ind. App. 588, 4 R. R. 120, 27 Am. & Eng. R. Cas., N. S., 120, 64 N. E. 39.

Kansas.—*Atchison, etc., R. Co. v. Hughes*, 55 Kan. 491, 40 Pac. 919, 2 Am. Eng. R. Cas., N. S., 248.

Massachusetts.—*Flaherty v. Boston & M. R. R. (Mass.)*, 14 R. R. 246, 37 Am. & Eng. R. Cas., N. S., 246, 72 N. E. 60.

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- **Mississippi.**—*Bardwell v. Mobile & C. R. Co.*, 63 Miss. 574.
- Missouri.**—*McPeak v. Missouri Pac. R. Co.* (Mo.), 2 Am. & Eng. R. Cas., N. S., 226.

Pennsylvania.—*Purvis v. Buffalo, etc., Co.* (Pa.), 27 R. R. R. 748, 50 Am. & Eng. R. Cas., N. S., 748, 68 Atl. 189.

Wisconsin.—*Schiffler v. Chicago, etc., Ry. Co.* (Wis.), 8 Am. & Eng. R. Cas., N. S., 122.

Conductor's Advice or Direction.—Where an adult passenger leaves a moving train under the advice or direction of the conductor, and, in leaving the train, receives personal injuries, such advice or direction cannot be held to excuse an act of negligence on the part of the passenger which amounts to an obvious act of recklessness or folly. So held in *South & North Alabama R. Co. v. Schaufier*, 75 Ala. 136, 21 Am. & Eng. R. Cas. 405.

Waiting for Train to Stop, but Required by Conductor to Jump.—In *Whitlock v. Comer* (C. C.), 57 Fed. Rep. 565, it is held that an adult male passenger, waiting for a train to come to a full stop before attempting to alight, who when required by the conductor, jumps from the moving train, when it is apparent that he cannot do so with safety, and is thereby injured, cannot recover therefor.

Advice of Conductor—Rapid Motion.—In an action for injuries sustained by a passenger in alighting from a moving train, it was not error to charge that if at the time it was obviously dangerous for the passenger to alight, on account of the rapid motion of the train, without the direction of the conductor, or under the direction of the conductor if the circumstances from such rapid motion would make it likely, or seem likely to him as an ordinarily prudent man, that it would be dangerous to do so, there could be no recovery for such injuries against the carrier. So held in *Sanders v. Southern Ry. Co.*, 107 Ga. 132, 32 S. E. 840.

Negligently Carried beyond Station—Advice of Conductor.—Where a passenger voluntarily leaves a moving train, merely to avoid being carried beyond his station, and in so doing is injured, his own contributory negligence is the proximate cause of the injury, and he cannot recover against the carrier, though the conductor was also negligent in not stopping the train to afford the passenger an opportunity to alight in safety. Nor is it sufficient to charge the railroad in such case that the conductor advised the passenger that he could safely jump from the train.

Carried beyond Station While Conversing with Friend—Advice and Assistance of Brakeman.—In *Pittsburg, etc., R. Co. v. Gray*, 28 Ind. App. 588, 4 R. R. R. 120, 27 Am. & Eng. R. Cas., N. S., 120, 64 N. E. 39, it appeared that a passenger, when the train arrived at the station of his destination, started to leave the car, but by reason of his stopping to converse with a friend he did not get off until the train started. The brakeman told him he would have to be quick, cautioned him to "step with the train," and assisted him to the car platform, but, on account of the motion of the train, the passenger fell and was injured. It was held there could be no recovery for his injuries.

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Mother Assisting Children to Board Train—Alighting with Assistance and Advice of Brakeman.—A mother boarded a train at a station to assist her children to take the train. She gave no notice to any employee in charge that she did not intend to become a passenger. Before she left the interior of the car the usual preparation for starting had been made, and when she came to the door of the car its platform gates were closed, and a brakeman beckoned her to the next platform, and said, as he helped her down the steps, "It is all right, not going very fast; be careful." It was held that the circumstances which made it negligent for the brakeman to act as he did were obvious, making it contributory negligence on her part to attempt to leave the train, precluding a recovery for injuries sustained. So held in *Flaherty v. Boston & M. R. R.* (Mass.), 14 R. R. R. 246, 37 Am. & Eng. R. Cas., N. S., 246, 72 N. E. 60.

After Assisting Family to Board Train—Told by Brakeman to Hurry Up.—In *Purvis v. Buffalo, etc., Co.* (Pa.), 27 R. R. R. 748, 50 Am. & Eng. R. Cas., N. S., 748, 68 Atl. 189, it is held that where a person goes on a train at a station with the permission of the trainmen to locate his family in a sleeper, and as he starts to leave the car, while the train is moving, the brakeman tells him to hurry up, and he is thrown under the moving car and injured, he is guilty of contributory negligence.

Conductor's Promise to Slacken Up at Intermediate Crossing—Six to Twelve Miles an Hour—Knowledge of Danger.—In *Bardwell v. Mobile & C. R. Co.*, 63 Miss. 574, it appeared that a passenger who had paid his fare between two stations, requested the conductor to stop for him to get off at an intermediate crossing, which was not a station. The conductor declined to stop the train, but promised to slacken its speed so that the passenger might jump off. The passenger, following the conductor's directions, jumped off, fell, and was injured. It was a dark night, and the train was running at from six to twelve miles an hour. Plaintiff admitted that he knew that the jump was dangerous. The jury were instructed to find for defendant. It was held that such instruction was proper, as it was plaintiff's duty to exercise his own judgment and discretion as a prudent and reasonable man, and the advice of the conductor furnished no legal excuse for his failure to do so.

Conductor's Mere Requirement to Alight—Absence of Overpowering Intimidation.—In *Bosworth v. Walker* (C. C. A.), 83 Fed. Rep. 58, it is held that a mere requirement or command by a conductor to a passenger to get off a moving train, when the danger of doing so is evident, if not accompanied with force, threats or overpowering intimidation, is not enough to make the railroad company liable for injuries sustained by reason of the passenger's compliance therewith.

Conductor's Silence on Hearing Another Passenger Advise Plaintiff to Alight.—The presence of the conductor and his silence on hearing another passenger tell plaintiff the car is not going to stop at the latter's station and he had better get off, will not justify him in jump-

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ing from the car, and thereby causing his own injury. So held in *Masterson v. Macon, etc.*, R. Co., 88 Ga. 436, 14 S. E. 591.

• **Train Slowly Approaching Station—Passenger's Mistake as to Conductor's Signals—Alighting from Flat Car.**—In *Rickert v. Southern Ry. Co.*, 123 N. Car. 255, 31 S. E. 497, it appeared that a passenger on a flat car mistook the conductor's signals, not intended for him, for orders to get off while the train was slowly approaching a station, and, in getting off, was injured by reason of the car being in motion. It was held that he could not recover.

Twelve Miles an Hour—Advice or Concurrence of Conductor—Use of Only Means of Alighting Provided.—But in *Southwestern R. Co. v. Singleton* 66 Ga. 252 it is held that if one leaps from a train moving at the rate of fifteen miles an hour on the advice or concurrence of the conductor, his right to recover would involve the question whether he prudently used the only means provided by the company for him to get off that the conduct of the same company permitted him to use, and also his recklessness and want of ordinary care.

Train Speed Slackened to Enable Passenger to Alight beyond His Station—Conductor's Direction.—And if after passing his station the speed of the train is slackened to enable a passenger to alight, and, under the direction of the conductor, he does get off, and, in so doing, is injured by reason of the motion of the train, the carrier is liable, it not being want of ordinary care for the passenger to prudently use the means the carrier affords him to get off the train. *Georgia R. & B. Co. v. McCurdy*, 45 Ga. 288.

C. When Train Is Moving Slowly.

Some of the authorities, however, hold that the advice or direction of a trainman will justify a passenger in leaving a slowly moving train.

Arkansas.—*St. Louis, etc.*, R. Co. *v. Cantrell*, 37 Ark. 519, 40 Am. Rep. 105, 8 Am. & Eng. R. Cas. 198; *St. Louis, etc., Ry. v. Person*, 49 Ark. 182, 4 S. W. 755; *St. Louis, etc., Co. v. Rosenberry*, 45 Ark. 256, 11 S. W. 212.

District of Columbia.—*Jones v. Baltimore & O. R. Co.*, 4 D. C. App. Cas. 158.

Georgia.—*Georgia R. & B. Co. v. McCurdy*, 45 Ga. 288; *Southern Ry. Co. v. Bandy (Ga.)*, 12 R. R. R. 736, 35 Am. & Eng. R. Cas., N. S., 736.

New York.—*Bucher v. New York, etc.*, R. Co., 98 N. Y. 128, 21 Am. & Eng. R. Cas. 361; *Quin v. Manhattan Ry. Co.*, 7 N. Y. St. Rep. 352; *Schurr v. Houston, etc.*, 10 N. Y. St. Rep. 262.

North Carolina.—*Johnson v. Atlantic, etc.*, R. R. R. 130, N. Car. 488; *Lambeth v. North Carolina R. Co.*, 66 N. Car. 494.

Pennsylvania.—*Delaware & Hudson Canal Co. v. Webster (Pa.)*, 6 Atl. Rep. 841, 27 Am. & Eng. R. Cas. 160.

Invitation of Person in Charge of Train.—In *Delaware & Hudson Canal Co. v. Webster (Pa.)*, 6 Atl. Rep. 841, 27 Am. & Eng. R. Cas. 160, it is held that it is not negligence per se for a passenger to alight

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from a slowly moving car, in accordance with an invitation of a person in charge of a train, the question being one for the jury.

Conductor's Direction—Carrier's Liability.—If under the direction of a conductor a passenger gets off a slowly moving train, the carrier is liable for the consequent injuries. So held in *Southern Ry. Co. v. Bandy* (Ga.), 12 R. R. R. 736, 35 Am. & Eng. R. Cas., N. S., 736.

Failure to Stop Train at Platform—Four Miles an Hour—Fall after Jumping upon Platform—Encumbered with Baggage—Conductor's Direction.—In *Lambeth v. North Carolina R. Co.*, 66 N. Car. 494, there was evidence tending to prove that plaintiff's intestate informed the conductor that he wished to get off at a certain point, and, on approaching the place, the conductor went with him and another, upon the platform of a rear car, and deceased got upon the step of the platform preparatory to springing off, the conductor cautioning him not to "jump off yet," and when a few moments after the conductor said "now is your time—jump," and thereupon he jumped off and on to a platform, fell down and rolled under the train and was killed, the train at the time going much slower by degrees than before the brakes were blown on, then another passenger, alighting immediately after deceased, running along with the train, rather than jumping off at right-angles, was not able to "take up" for several yards; that the intestate, when he jumped off, had under his left arm a stencil-plate about the size of an ordinary barrel-head, between two pieces of very thin plank, also a satchel of capacity sufficient to hold two quarts, to which was attached light leather straps, passing around his shoulders; and that he also had a book. Plaintiff requested the following instructions to the jury: "That if the jury should find that the defendant did not stop its train along side of the place where the intestate desired to alight, and that the conductor while passing such place (a platform), and when the cars were moving at from two to four miles an hour, directed the intestate to alight, and he obeyed the direction, he was justified in doing so, and his act, in law, was not contributory negligence hindering a recovery." It was held that the refusal of the court to give such instructions was erroneous, and entitled plaintiff to a venire de novo.

Train Barely Moving—Assisted to Alight by Person in Charge of Train.—In *Georgia Pac. Ry. Co. v. West*, 66 Miss. 310, 6 So. 207, it is held that the court properly refuses to instruct that it is contributory negligence per se for a passenger to alight from a train on the platform of the station if the train is in motion, where the only evidence as to the train's failure to stop is that it was barely moving, and the passenger was being assisted to alight by an employee in charge of the train.

On Wrong Train—Slowed Down at Station—Permission of Conductor.—In *Schurr v. Houston, etc.*, 10 N. Y. St. Rep. 262, it appeared that plaintiff by mistake got on an express train, which did not stop at the station for which he had purchased his ticket. On taking the ticket the conductor told him that the train would be slowed down as the station was approached and he could alight. It was held that.

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whether plaintiff was negligent in so doing was a question for the jury.

Train Moving Very Slowly after Reaching Station—Invitation to Alight—Open Car Gates.—In *Quinn v. Manhattan Ry. Co.*, 7 N. Y. St. Rep. 252, it is said in the opinion: "The evidence also showed that there were gates upon the cars to prevent passengers getting off while the cars are in motion, and that the man in charge of the gates, after calling the station and after the train had reached the station, and was certainly moving very slowly, if at all, opened the gates to allow passengers to alight, which was a substantial assurance to the plaintiff of safety, and was just as significant as if the gateman had invited the plaintiff to alight, and that any prudent person would not be influenced by it is against all human experience. *Glushing v. Sharp*, 96 N. Y. 676."

Carried Past Station—Danger Not Apparent—Conductor's Direction.—When his train stops at the station to which a passenger is bound, but before he is able to alight, it is started again and he is injured in attempting to alight, under the conductor's direction, while the train is moving slowly and the danger is not apparent, he is not chargeable with contributory negligence. So held in *St. Louis, etc., Ry. v. Person*, 49 Ark. 182, 4 S. W. 755.

Told to Alight by Conductor—Reassuring Circumstances.—If a passenger is told by the conductor to alight from a moving train, or given by him to understand that he can do so in safety, and the circumstances are such as to give him reason to believe that he may, he is justified in making the attempt. So held in *Bucher v. New York, etc., R. Co.*, 98 N. Y. 128, 21 Am. & Eng. R. Cas. 361.

Slowly Moving Train—Danger Not Apparent—Conductor's Direction.—A passenger who alights from a slowly moving train at the instance or direction of the conductor, or other agent in the management of the train, upon whose opinion or judgment in the matter he has the right to rely, and when the risk of danger is not apparent, is not chargeable with contributory negligence. So held in *St. Louis, etc., R. Co. v. Cantrell*, 37 Ark. 519, 40 Am. Rep. 105, 8 Am. & Eng. R. Cas. 198.

D. Right to Rely on Judgment of Trainman.

And it has been held that a passenger has generally the right to rely on the experience and judgment of the trainman or other railway employee who is directing him to leave a moving train or car.

Arkansas.—*St. Louis, etc., Co. v. Rosenberry*, 45 Ark. 256, 11 S. W. 212.

Illinois.—*Illinois Cent. R. Co. v. Slatton*, 54 Ill. 133.

Iowa.—*Vimont v. Chicago & N. W. Ry. Co.*, 71 Iowa 58, 32 N. W. 100.

Missouri.—*Owens v. Wabash Ry. Co.*, 84 Mo. App. 143; *Shareman v. St. Louis Transit Co.*, 103 Mo. App. 515.

Nebraska.—*Chicago, etc., R. Co. v. Landauer*, 39 Neb. 803, 58 N. E. 434.

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North Carolina.—*Hodges v. Southern Ry. Co.* (N. Car.), 8 Am. & Eng. R. Cas., N. S., 46; *Johnson v. Atlanta & N. C. R. Co.* (N. Car.), 3 R. R. R. 770, 26 Am. & Eng. R. Cas., N. S., 770, 41 S. E. 794; *Lambeth v. North Carolina R. Co.*, 66 N. Car. 494.

Texas.—*Gulf, etc., Ry. Co. v. Shelton*, 30 Tex. Civ. App. 72.

Obvious but Slight Danger—Conductor's Judgment.—When the danger in alighting from a moving train is obvious, but slight, a passenger has the right to rely upon the judgment of the conductor, whose duty and experience he may presume gives him a superior knowledge in such matters. So held in *St. Louis, etc., Co. v. Rosenberry*, 45 Ark. 256, 11 S. W. 212.

Authority of Brakeman to Direct Passenger to Alight.—In *Owens v. Wabash Ry. Co.*, 84 Mo. App. 143, it is held that a brakeman, whose duty it is to assist passengers on and off the car and to call stations, is acting within the scope of his agency in directing a passenger who is being carried past his station, to get off, and the carrier is bound by his direction.

Porter's Assurance of Safety—Darkness—Impossibility of Knowing That Train Was Moving.—In *Hodges v. Southern Ry. Co.* (N. Car.), 8 Am. & Eng. R. Cas., N. S., 46, there was evidence that plaintiff's station had been twice called and that he went to the front end of the car to get off, the porter opening the door for him, and stepped down to the last step of the car, whereupon the porter, who was standing behind him with the light, said, "all right Sir," and plaintiff stepped from the train which he could not tell was moving, owing to the darkness, and was injured. It was held that he was not guilty of contributory negligence per se.

Train Running at Full Speed—Alighting at Supposed Invitation of Conductor.—In *Doolittle v. Southern Ry.*, 62 S. Car. 130, it is held that the question whether a passenger is guilty of contributory negligence in alighting from a passenger train running at full speed depends upon the facts of the particular case. In this case the passenger thought he was alighting in pursuance of an invitation to that effect from the conductor.

9. WARNING OF TRAINMAN DISREGARDED.

And there are cases in which it is held that it is negligence per se for a passenger to alight from a moving car when warned by a trainman that it is dangerous to do so. *Campbell v. Los Angeles Ry. Co.* (Cal.), 1 R. R. R. 85, 24 Am. & Eng. R. Cas., N. S., 85, 67 Pac. 50; *Western & A. R. Co. v. Goodwin* (Ga.), 12 Am. & Eng. R. Cas., N. S., 219; *Evansville & C. R. Co. v. Duncan*, 28 Ind. 441; *Kilpatrick v. Pennsylvania R. Co.*, 140 Pa. St. 502, 21 Atl. 408.

Carried beyond Destination—Conductor's Protest.—In *Duncan v. Wyatt Park Ry. Co.*, 48 Mo. App. 659, it appeared that plaintiff on boarding the car notified the conductor that she wished to get off at a certain street intersection. The conductor failed to stop the car at such point, and as soon as plaintiff discovered that she was being car-

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ried past it she called the attention of the conductor to the fact, who, as was contended by defendant, rang the bell as a signal to stop the car, but that plaintiff, against the conductor's protest, walked out on the platform, and proceeded to get off before the car had stopped, and, in consequence of which, was thrown down and injured. It was held there could be no recovery if her injuries were sustained under such circumstances.

Without Necessity and in Spite of Warning.—When it appeared that a passenger's injuries were caused by jumping from a moving train of the defendant, and at a time when there was no apparent necessity for leaving it, and when he was told by the carrier's agent not to do so, there can be no recovery for such injuries. So held in *Western & A. R. Co. v. Goodwin* (Ga.), 12 Am. & Eng. R. Cas., N. S., 219.

Failure to Alight in Time—Warned by Brakeman.—In *New York, etc., R. Co. v. Enches*, 127 Pa. St. 316, 17 Atl. 991, there was evidence that plaintiff delayed leaving the car when the train stopped, and attempted to alight after the train started though warned by the brakeman against it. It was held that it was error to refuse to charge that "if jury believed from the evidence that the plaintiff undertook to get off the train after it began to move, in disregard of the warning of the brakeman not to, she was guilty of contributory negligence and cannot recover."

Told by Motorman Not to Get Off before Car Stopped.—Where plaintiff told the motorman to stop at a certain street, of which request he took no notice; and, while crossing such street plaintiff touched the motorman, and asked him why he did not stop the car, whereupon the motorman immediately proceeded to slow up, and, while doing so, told plaintiff not to get off until the car stopped, but plaintiff stepped off the car before it stopped, and was injured, he was not entitled to recover. So held in *Campbell v. Los Angeles Ry. Co.* (Cal.), 1 R. R. R. 85, 24 Am. & Eng. R. Cas., N. S., 85, 67 Pac. 50.

Encumbered with Baggage—Darkness—Six Miles an Hour—Alighting without Reason to Believe That Train Would Not Stop, and against Advice of Conductor.—A passenger on a steam railroad train, who, when encumbered with hand-baggage, steps from the train on a dark night, while it is moving at the rate of six or eight miles per hour, before it has reached the platform of a regular station, at which he was to get off, and with the locality of which he was acquainted, against the advice of the conductor, and without reason to believe that the train would not stop, as usual, at the platform, is guilty of contributory negligence, which bars him from recovering damages for personal injuries sustained in stepping from the train. So held in *South & North Alabama R. Co. v. Schaufler*, 75 Ala. 136, 21 Am. & Eng. R. Cas. 405.

Warning from Fellow Passenger.—In *Kilpatrick v. Pennsylvania R. Co.*, 140 Pa. St. 502, 21 Atl. 408, it is held that a passenger who, without necessity, attempts to alight from a moving train, in the face of a warning from a fellow passenger not to do so, is guilty of contribu-

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tory negligence, and cannot recover for injury received in such attempt, because while not bound to obey such a warning, the passenger warned disregards it at his peril, from whatever source it comes. It is enough that his attention is drawn to his danger.

10. ALIGHTING FROM TRAIN AFTER SPEED HAS BEEN MERELY DECREASED.

It has been held that the contributory negligence of a passenger in attempting to alight from a moving train is, generally, a question for the jury, where such attempt was induced by the act of those in charge of the train in decreasing its speed under such circumstances as to justify the passenger in believing that it was about to stop at his destination, and then increasing the speed. *Richmond v. Quincy, etc., Ry. Co.*, 49 Mo. App. 104; *Chicago, etc., R. Co. v. Winfrey (Neb.)*, 39 N. W. 523, 6 R. R. R. 689, 29 Am. & Eng. R. Cas., N. S., 689; *Cooper v. Georgia, etc., R. Co.*, 61 S. Car. 345; *Edgar v. Northern R. Co.*, 11 Ont. App. Rep. 452, 22 Am. & Eng. R. Cas. 433.

Station Announced and Train Slowed Up.—In *Richmond v. Quincy, etc., Ry. Co.*, 49 Mo. App. 104, it is held that whether it is negligent in a passenger to attempt, at the station of his destination, where it has been announced and the train slowed up, but not stopped, to alight from the still moving train after it has passed the depot, depends on all the circumstances, and is a proper question for the jury.

Station Announced and Train Slowed Up—Invitation to Alight—Woman Injured.—In *Edgar v. Northern R. Co.*, 11 Ont. App. Rep. 452, 22 Am. & Eng. R. Cas. 433, it appeared that after the name of the next station had been called the train was slowed up on approaching and passing it, but was not brought to a full stop, and the plaintiff, who had purchased a ticket for that station sustained injuries in alighting there. It was held that this tended to show an invitation to alight there, and it was for the jury to say whether plaintiff, a woman, acted in a reasonably prudent and careful manner in taking advantage of it.

11. ALIGHTING FROM STREET CAR AFTER SPEED HAS BEEN MERELY DECREASED.

And the rule above stated as being applicable to passengers on ordinary railroad trains applies also to street car passengers. *Topp v. United Rys. & Elec. Co. (Md.)*, 14 R. R. R. 248, 37 Am. & Eng. R. Cas., N. S., 248, 59 Atl. 52; *Dawson v. St. Louis Transit Co.*, 102 Mo. App. 277, 76 S. W. 689; *Grissey v. Hestonville, etc., Ry. Co.*, 75 Pa. St. 83.

Signal to Stop Car—Right to Assume That Car Will Continue to Slow Down.—In *Dawson v. St. Louis Transit Co.*, 102 Mo. App. 277, 76 S. W. 689, it is held that when a passenger on an electric street car touches the electric button to warn the motorman of his desire to alight, and the car slows down, he has a right to assume that the car

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will continue to slow until he can get off, and that it will not increase its speed before he is off.

Speed Slackened for Thirteen Year Old Boy.—In *Grissey v. Hestonville, etc., Ry. Co.*, 75 Pa. St. 83, it appeared that plaintiff, thirteen years of age, signalled a street car, got on the front platform without objection from the driver or conductor and paid his fare. After riding for a considerable distance, plaintiff said he was going to get off, the driver slowed up, but did not stop, and in getting off plaintiff was injured. It was held that whether he was guilty of contributory negligence was for the jury.

Jumping Off While Speed Was Increasing, after Car Had Slowed Up.—Where a passenger on a street car signaled it to stop for him to alight, and he testified that, on the car slowing up and then increasing its speed, he concluded it was not going to stop, whereupon he jumped off and was injured, the question of his contributory negligence was for the jury. So held in *Dallas Rapid Transit Co. v. Payne (Tex.)*, 15 R. R. R. 25, 38 Am. & Eng. R. Cas., N. S., 25, 82 S. W. 649.

Invitation to Alight—Full Speed Resumed While Alighting, with Grip in Hand.—In *Marbourg v. Seattle, etc., Co. (Wash.)*, 29 R. R. R. 607, 52 Am. & Eng. R. Cas., N. S., 607, it is held that where a passenger on a street car asked the conductor to stop at a certain street, and he said "all right," and, upon approaching the street, the conductor closed the gates on the platform side of the car, and left the gates open on the opposite side, and then gave the signal to stop, and plaintiff, with a grip in his hand, stood at the open gate, and when the car slowed down as though to stop, alighted, but was thrown and injured by the car starting up at full speed, the passenger was not guilty of negligence, as a matter of law.

Speed Greatly Reduced—Stepping Off Running Board—Sudden and Violent Jerk.—In *Walters v. Collins Park, etc., R. Co.*, 95 Ga. 519, 20 S. E. 497, it appeared that plaintiff signaled the conductor to stop, that the speed of the car was greatly reduced, that while it was in motion plaintiff stepped out upon the running board, picked up his sample case with his right hand, turned his body a little outward from the car, let loose the upright support with his left hand, and was just in the act of stepping off when the conductor signaled the motorman to go forward, who obeyed, and the car gave a sudden and violent jerk, by reason of which plaintiff was thrown to the ground and injured. It was held that under these facts it was error to grant a nonsuit.

Speed Only Slackened—Fear of Being Carried beyond Destination—Sudden Jerk—Instructions.—But in *West End, etc., Ry. Co. v. Mozely*, 79 Ga. 463, 4 S. E. 324, it was held that it was error to charge as follows: "If the plaintiff signaled the driver (of a street car) to stop, and the driver did not stop so as to allow the plaintiff reasonable opportunity to alight with safety, but the driver only slackened his

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speed, and the plaintiff, to avoid being carried beyond his destination, and availing himself of what opportunity was afforded him to alight, endeavored to get off the car while it was in motion and was thrown down by a sudden jerk of the car, the defendant (the carrier) would be liable, provided you believe from the evidence that the driver was negligent in not stopping the car altogether;" and that this charge should have been further qualified by saying, if the jury further believed that the plaintiff used all reasonable and ordinary care and diligence to avoid the consequences of the defendant's negligence to himself.

12. ABSENCE OF NECESSITY.

And it has been frequently held that there can be no recovery against the carrier for an injury sustained by a passenger in alighting from a moving train or street car where his act was not induced by a necessity, real or apparent.

Alabama.—*Central R. & B. Co. v. Miles*, 88 Ala. 256, 6 So. 696; *McDonald v. Montgomery St. Ry.*, 110 Ala. 161, 20 So. 317; *Ricketts v. Birmingham St. Ry. Co.*, 85 Ala. 600, 5 So. 353; *South & North Alabama R. Co. v. Schaffer*, 75 Ala. 136, 21 Am. & Eng. R. Cas. 405.

Georgia.—*Western & A. R. Co. v. Goodwin* (Ga.), 12 Am. & Eng. R. Cas., N. S., 219; *Whelan v. Georgia, etc., R. Co.*, 84 Ga. 506, 10 S. E. 1091.

Indiana.—*Pittsburgh, etc., R. Co. v. Miller*, 33 Ind. App. 128.

Iowa.—*Vimont v. Chicago & N. W. Ry. Co.*, 71 Iowa 58, 32 N. W. 100.

Missouri.—*Leslie v. Wabash, etc., Ry. Co.*, 88 Mo. 50, 26 Am. & Eng. R. Cas. 229.

North Carolina.—*Lambeth v. North Carolina R. Co.*, 66 N. Car. 494.

Wisconsin.—*Walters v. Chicago, etc., Ry. Co.* (Wis.), 2 R. R. R. 237, 25 Am. & Eng. R. Cas., N. S., 237, 89 N. W. 140.

Moving Train.—An adult who knowingly and unnecessarily steps from a moving train is guilty of contributory negligence as matter of law. So held in *Walters v. Chicago, etc., Ry. Co.* (Wis.), 2 R. R. R. 237, 25 Am. & Eng. R. Cas., N. S., 237, 89 N. W. 140.

Alighting after Conductor Had Answered His Signal to Stop and Train Was Slowing Down.—Where a train was stopped at a station, but somewhat away from its usual place of stopping at that station, and where there was not good ground for alighting, and a passenger, thinking the train would be moved up to the usual place, failed to get off, as he intended, and after the train had left the station and was fairly on its way to its next stopping place, the passenger seized the bell-rope, rang the engine bell, and took his position on the lower step of the platform to get off, and the engineer having answered the bell, as the cars were coming to a stop, but before they were stopped, the passenger, deeming the motion slow enough for safety, undertook to step off, but just as he was stepping he was, by a sudden jerk of the train, thrown down, and his arm crushed by one of the car wheels.

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It was held that the passenger was guilty of gross negligence, and that it was error to charge that the carrier would be liable, if, at the time of his attempt to alight, the train was moving so slowly that he thought it was safe to alight. *Blodgett v. Bartlett*, 50 Ga. 353.

Woman Voluntarily Jumping Off Train When It Is About to Stop—Conductor's Offer of Assistance.—In *Lambeth v. North Carolina R. Co.*, 66 N. Car. 494, it is held that if, when the usual signal is given for slackening the speed of the train the conductor goes with a passenger out on the car platform to assist her in getting off safely, and the passenger without any directions from the conductor, voluntarily increases danger by jumping off the train while it is moving, there can be no recovery against the carrier for injury resulting therefrom.

Station Announced and Brakes Applied—Misled by Brakeman's Conduct.—In *Pittsburgh, etc., R. Co. v. Miller*, 33 Ind. App. 128, an action by a passenger for personal injuries, the complaint alleged that defendant's brakeman announced the station, the air brakes were applied, and the brakeman went out of the door and down the steps to the station platform, but did not take his lantern; that the train appeared to have stopped, and the action of the brakeman led plaintiff to believe it had stopped; that plaintiff stepped from the car steps to the platform, and, because of the wet and slippery condition of the platform, and the fact that the train was moving, he was thrown upon the platform and injured. It was held that the complaint showed such contributory negligence on the part of plaintiff as to prevent a recovery against the carrier.

Stepping from Platform of Steam Railroad Car.—Stepping from the platform of a steam railroad car while it is moving, in the face of obvious danger, or when there is no reasonable necessity, real or apparent, constitutes such contributory negligence as will defeat a recovery for damages on account of injuries sustained thereby. So held in *Central R. & B. Co. v. Miles*, 88 Ala. 256, 6 So. 696.

Street Car.—When a person steps from a moving street car without any necessity therefor and is injured, which injury would have been avoided if he had remained on the car, he is guilty of such contributory negligence as will preclude his recovery. So held in *McDonald v. Montgomery St. Ry.*, 110 Ala. 161, 20 So. 317.

Stepping from Front Steps of Car with Keg of Lead.—If a passenger, having a heavy keg of lead in his hands, was standing on the front steps of the street car when it started forward, and, without necessity, attempted to step down to the ground while the car was in motion, and was thrown and injured, when he would not have been injured had he remained on the steps, he was guilty of proximate contributory negligence which prevents a recovery. So held in *Ricketts v. Birmingham St. Ry. Co.*, 85 Ala. 600, 5 So. 353.

13. SUFFICIENT TIME TO ALIGHT AFFORDED.

And it may be stated as a general rule that a passenger cannot

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recover for injuries sustained in jumping from a moving train after it had stopped long enough to allow him to alight at his destination while it was standing, and his neglect to do so was due to his failure to exercise reasonable promptness in attempting to leave the train. If, after a train has stopped a reasonably sufficient time to allow him to alight in safety, a passenger jumps from it after it is again in motion, he cannot recover for injuries thereby sustained. *Covington v. Western & A. R. Co.*, 81 Ga. 273, 275, 6 S. E. 593.

Train Started before Passenger's Attempt.—In *Straus v. Kansas City, etc., R. Co.*, 75 Mo. 185, 6 Am. & Eng. R. Cas. 384, it is held that where the conductor, after allowing sufficient time for passengers to alight, starts the train before the passenger is in the act of getting off, and, after the train is in motion, the passenger, who has been dilatory, jumps from the train and is injured, he cannot recover.

Insufficient Time to Alight—Slowly Moving Train—Conductor Stepping Aside to Allow Plaintiff to Alight.—In *Johnson v. Atlanta & N. C. R. Co. (N. Car.)*, 3 R. R. R. 770, 26 Am. & Eng. R. Cas., N. S., 770, 41 S. E. 794, the evidence showed that the time allowed at the station was too brief to permit plaintiff to alight before the train started. Plaintiff testified that when the train stopped he left the car as quickly as he could; that when he reached the platform he found the conductor on the steps, and asked him to let him pass; that the conductor stepped aside, and allowed him to get off; that the train did not stop as long as usual that morning; and that when he stepped off the train was moving slowly, and he thought that he could do so safely. It was held to justify a finding that plaintiff was not guilty of contributory negligence.

Woman Jumping after Train Was Well under Way—Failure to Notify Trainmen or to Examine Landing Place.—In *Chicago, etc., R. Co. v. Landauer*, 30 Neb. 803, 58 N. W. 434, it appeared that after a train stopped at a station, the conductor called out its name, but did not leave the train, being engaged in collecting tickets, but by his order the brakeman got off at the rear of the train, and walked along the station platform to the last car, where, after assisting some passengers to alight, and seeing no others to get off, he gave the signal "all aboard." After the train had started and was well under way, plaintiff, who had occupied the fourth seat from the front of the rear car, came out upon the front platform thereof, and after hurriedly stepping down one step, and without warning to the conductor or brakeman, and without looking to see where she would land, jumped at a right angle from the train, and in falling was severely injured. Another passenger, who had alighted on the opposite side, had walked the length of a car, crossed over on the car platform, and walked fifty feet, to the gate of a park that distance from the station, while other passengers had walked to a point some distance inside the park fence, before the train pulled out. It also appeared that plaintiff was a young woman of average intelligence. It was held that she was guilty of

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such contributory negligence as to prevent a recovery for the injuries sustained by her in jumping from the train.

Care Required of Passenger in Making Choice.—In *Louisville, etc., Ry. Co. v. Coons* (Ky.), 76 S. W. 45, it is held that an instruction that, if the train remained standing reasonably long enough for plaintiff (a passenger) to alight, and she negligently delayed to do so till it was in motion, and got off while it was in motion, and her injuries were the result of her contributory negligence, she could not recover; and that the meaning of negligence as used in the instruction was the absence of care, was erroneous in stating in effect that unless she showed an absence of all care in alighting verdict should be for her, as her choice to get off, if the train is started before she has time, must not be exercised negligently or unreasonably.

14. EJECTION THREATENED.

But a passenger cannot be charged with contributory negligence in jumping from a moving train or street car, although the speed is such as to make the danger of his act obvious, if he has sufficient reason to believe that his only alternative is that of being immediately and violently ejected.

Orders of Conductor Who Is Ejecting Passenger.—In *International, etc., R. Co. v. Hassell*, 62 Tex. 256, 21 Am. & Eng. R. Cas. 315, it is held that a passenger who is injured in jumping from a train, under the orders or directions of a conductor who is ejecting him, is not guilty of contributory negligence.

Fear of Ejection—Causeless Fear.—In *St. Louis, etc., Co. v. Rosenberry*, 45 Ark. 256, 11 S. W. 212, it is held that if a passenger leaps from a moving train under the belief, justified by the conduct of trainmen, that he will be ejected if he does not go voluntarily or without force, he is not chargeable with negligence, but if he has no cause for such belief he is guilty of negligence.

Will of Woman Coerced by Manifestations and Directions of Conductor—Protests.—In *Highland Avenue, etc., R. Co. v. Winn*, 93 Ala. 306, 9 So. 509, it is said in the opinion: "If the jury found that plaintiff's attempt to alight was due to a coercion of her will by the manifestations and directions of the conductor, she protesting against having to do so while the train was yet in motion, and the injuries resulted proximately from this alone, or from it and another cause conjointly, this would have been such force and willfulness as is laid in the complaint, although there was no laying on of hands and no actual hostile demonstration made by the conductor."

Apprehension of Danger in Alighting—Dangerous Alternative.—In *International, etc., R. Co. v. Hassell*, 62 Tex. 256, 21 Am. & Eng. R. Cas. 315, it is said in the opinion: "It is true that the appellee (the injured passenger) thought the leap dangerous, but even though this was true, if the alternative of jumping from the car while in motion or of being ejected from the car while in motion was presented to him,

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it cannot be claimed as matter of law that his election was not that most likely to be attended with the least danger nor that thus electing and leaping from the car was negligence per se."

15. IMMINENT DANGER IN REMAINING ON TRAIN OR CAR.

Nor is a passenger guilty of contributory negligence in jumping from a moving train or car when a collision or other danger to those on the car would appear to be imminent to a person of ordinarily reasonableness and prudence, and might cause such a person to make the same choice between dangerous alternatives.

Alabama.—*Selma St. Sub. Ry. Co. v. Owen* (Ala.), 2 R. R. R. 97, 25 Am. & Eng. R. Cas., N. S., 97, 31 So. 598.

California.—*Mitchell v. Southern Pac. R. Co.*, 87 Cal. 62, 25 Pac. 245.

Colorado.—*Denver, etc., Co. v. Dwyer*, 22 Colo. 132, 36 Pac. 1106.

Illinois.—*Chicago & E. I. R. Co. v. Stormont* (Ill.), 21 Am. & Eng. R. Cas., N. S., 116, 60 N. E. 104; *Galena, etc., R. Co. v. Yarwood*, 17 Ill. 509; *Mobile & Ohio R. Co. v. Klein*, 43 Ill. App. 63.

Indiana.—*Woolery v. Louisville, etc., Ry. Co.*, 107 Ind. 381, 8 N. E. 226.

Louisiana.—*Chretien v. New Orleans Rys. Co.* (La.), 15 R. R. R. 262, 38 Am. & Eng. R. Cas., N. S., 262, 37 So. 716.

Maine.—*Shannon v. Boston & A. R. Co.*, 78 Me. 52, 2 Atl. 678.

Maryland.—*Western Maryland R. Co. v. Herold*, 74 Md. 510, 22 Atl. 323.

Michigan.—*Howell v. Lansing City Elec. Ry. Co.* (Mich.), 12 R. R. R. 61, 35 Am. & Eng. R. Cas., N. S., 61, 99 N. W. 406.

Minnesota.—*Wilson v. Northern Pac. R. Co.*, 26 Minn. 278, 3 N. W. 333.

New York.—*Buel v. New York Cent. R. Co.*, 31 N. Y. 314; *Twomley v. Central Park, etc., R. Co.*, 69 N. Y. 158, 18 Am. Ry. Rep. 113.

Pennsylvania.—*Leggett v. Western, etc., R. Co.*, 143 Pa. St. 39, 21 Atl. 996.

West Virginia.—*Mannon v. Camden Interstate Ry. Co.* (W. Va.), 49 S. E. 450, 15 R. R. R. 312, 38 Am. & Eng. R. Cas., N. S., 312.

Collision Imminent.—A passenger who attempts to escape from a railroad car upon seeing a collision to be imminent is not guilty of contributory negligence. So held in *Buel v. New York Cent. R. Co.*, 31 N. Y. 314.

Woman Jumping from Moving Train upon Platform, Where Her Child Had Fallen—Premature Starting of Train.—In *Pennsylvania R. Co. v. Kilgore*, 32 Pa. St. 292, it appeared that a female passenger, accompanied by three young children, on arriving at an intermediate station, proceeded to alight with them. Two of the children had left the car, and while plaintiff was still upon the train, the cars started, when she sprang upon the platform, on which one of the children had fallen, and was injured. It was held that she was not guilty of such

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contributory negligence as would prevent her from recovering damages for injuries sustained by the premature starting of the train.

Failure to Give Reasonable Time to Alight—Mother Jumping from Moving Train after Small Child Had Alighted.—In *Loyd v. Hannibal & St. J. R. Co.*, 53 Mo. 509, 12 Am. Ry. Rep. 474, an action for injuries sustained by plaintiff in getting from the platform of the car upon that of the depot, the evidence showed that the train stopped at the station only a minute; that during that time plaintiff's little child alighted and plaintiff followed without delay, but after the train was in motion, and received her injuries in consequence of jumping from the train. It was held that the fact that she jumped from a moving car would not prevent a recovery.

Woman with Packages Reaching Car Steps before Aware That Train Is Moving—Suddenness of Dangers.—In *Leggett v. Western, etc., R. Co.*, 143 Pa. St. 39, 21 Atl. 996, plaintiff's testimony was to the effect that she was a passenger on defendant's train, which reached her station after dark; that she started out of the car, with a number of packages, and when she reached the steps she became aware that the train was moving, having been negligently started before she had been given a reasonable opportunity to alight. Plaintiff testified that, at the instant of discovering that the train was moving, she went off the car, falling upon the ground and receiving injuries, without any conscious effort on her part to leave the car, and without having had time to think of doing so. There was testimony for defendant which tended to show that she stepped or jumped off the train. It was held that the court properly submitted to the jury the question whether the plaintiff stepped down or jumped from the moving car, with instructions that, if she did so, she could not recover, unless she had reason to apprehend greater danger from remaining on the train, or the suddenness of the danger confronting her rendered her incapable of exercising proper judgment.

Train Suddenly Started While Woman Was Descending Car Steps—Perilous Position.—Though a passenger jumps or steps from a train after it is in motion, yet if, while she was descending the steps, it was suddenly, carelessly, and without warning to her set in motion, and she was thereby placed in a perilous position, and acted as a reasonably prudent person would under the circumstances, she may recover for her injuries. So held in *Chicago & E. I. R. Co. v. Stormont* (Ill.), 21 Am. & Eng. R. Cas., N. S., 116, 60 N. E. 104.

Lame Woman Still on Running Board after Car Resumed Its Motion—Position of Danger—Not Bound to Show Absolute Necessity for Act.—In *United Rys. v. Beidelman*, 95 Md. 480, 52 Atl. 913, plaintiff, a passenger on an open car of defendant's electric railway, testified that she signaled to the conductor to stop at a certain corner and when the car stopped she got upon the foot-board and, while holding to the hand rail with one hand and in the act of putting her left foot to the ground, the car started again and she was thrown to the

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ground and injured; that she was somewhat lame and could not move with agility. She was the only witness to the accident, and on cross-examination she seemed to say that she began to step off the running board after the car started. It was held that plaintiff was in a position of danger on the foot-board, owing to her lameness, and the degree of care she was bound to observe in order to avoid the consequences of defendant's negligence was only ordinary care, and she was not bound to show an absolute necessity for the action she took, and that, consequently, instructions to the jury that there was such contributory negligence on the part of plaintiff as precludes a recovery, or that if plaintiff voluntarily and without necessity stepped from the foot-board to the ground while the car was moving the verdict must be for defendant carrier, were both properly refused.

Child Jumping from Train after Father Had Jumped to Assist Wife—Excitement Caused by Carrier's Negligence.—Where a passenger, with his wife and children, is in the act of alighting from a train stopped at a station, and when the wife, with an infant in her arms, having reached the lower step of the car, is thrown violently to the ground by the sudden starting of the car, the husband's act in jumping off to her assistance while the train is in motion and leaving the other children of tender years on the platform, one of whom is injured in attempting to jump off after its parents, is not such contributory negligence as debars recovery for injury to the child. So held in *Lehman v. Louisiana W. R. Co.*, 37 La. Ann. 705.

Same—Not Required to Notify Driver of Wish to Alight.—A passenger who was injured by jumping from a moving street car which was about to be run into by a locomotive was under no duty to notify the driver that she wished to alight. So held in *Selma St. & Sub. Ry. Co. v. Owen (Ala.)*, 2 R. R. R. 97, 25 Am. & Eng. R. Cas., N. S., 97, 31 So. 598.

Boy's Attempt to Alight from Moving Horse Car—Falling under Car While Trying to Avoid Blow from Driver's Whip.—In *Mettlesstadt v. Ninth Avenue R. Co.*, 32 How. Pr. (N. Y.), 428, 4 Rob. 377, it appeared that a boy about fourteen years of age was riding upon the top of a street car as a passenger, and on arriving at the corner of a certain street, requested the driver to stop as he wished to get off, but the driver did not stop, and on going about half the block at a moderate speed, the boy attempted to get off the car, and in doing so the driver caught him by his head, pulled off his cap, and struck him with his whip, and in attempting to avoid the blow from the whip he fell under the car and was severely injured. It was held that a judgment of dismissal of the complaint, on the ground that the getting off the car while in motion, was negligence on the part of plaintiff, should be reversed.

Panic Caused by Carrier's Employee—Effect of Absence of Proof.—But railroad company is not liable to a passenger who, in a state of panic or fear, jumps out of a moving train, and is injured thereby, in

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the absence of proof that such fear was caused by word or act of an agent or employee of the carrier. So held in *Reary v. Louisville, etc., Ry. Co.*, 40 La. Ann. 32, 3 So. 390.

Passenger Voluntarily in Wrong Car—Jumping after Its Derailment.—And in *Galena, etc., R. Co. v. Yarwood*, 15 Ill. 468, where it appeared that a passenger was taken on a train of defendant, and was told that the passenger cars were full, and that he must ride in the baggage car, but he commenced playing with his companions, obstructed into the passenger car, and when that car was thrown from the track leaped from it and was injured, it was held that he could not recover.

Passenger Frightened by Proximity of Telegraph Pole—Letting Go of Car While Position Unfavorable.—So in *Lindsay v. Southern Ry. Co. (Ga.)*, 3 R. R. R. 748, 26 Am. & Eng. R. Cas., N. S., 748, 41 S. E. 46, it is held that, though it may not, under all circumstances, be an act of negligence to alight from a moving train, yet where a passenger, when the train upon which he was riding was moving away from the station of his destination, "went out on the platform, and got on the steps of the car, * * * moved down the steps, put one foot off, and swung himself in a position to get off" but was not "able, in the position in which he was then placed, to step on to the ground," and while in this position, discovered a telegraph post near the track, "and, perceiving that if he undertook to recover himself and get back on the train he would strike said post, and perhaps fall under the train, turned loose, and was thrown to the ground;" and, in consequence, received physical injuries, he was not entitled to hold the railway company liable therefor.

16. WHEN DANGER OF REMAINING ON TRAIN OR CAR IS MERELY APPARENT.

And the fact that the danger of remaining on the train or car was only apparent, and the passenger would not have been injured had he not so attempted to escape from it, does not constitute his act contributory negligence.

Alabama.—*Selma St. & Sub. Ry. Co. v. Owen (Ala.)*, 2 R. R. R. 97, 25 Am. & Eng. R. Cas., N. S., 97, 31 So. 598.

Arkansas.—*St. Louis, etc., Ry. Co. v. Murray*, 55 Ark. 248, 18 S. W. 50.

California.—*Mitchell v. Southern Pac. R. Co.*, 87 Cal. 62, 25 Pac. 245.

Indiana.—*Woolery v. Louisville, etc., Ry. Co.*, 107 Ind. 381, 8 N. E. 226.

Massachusetts.—*Ingalls v. Bills*, 9 Metc. (Mass.), 1.

Minnesota.—*Wilson v. Northern Pac. R. Co.*, 26 Minn. 278, 3 N. W. 333.

Missouri.—*Dimmit v. Hannibal & St. J. Ry. Co.*, 40 Mo. App. 654.

New York.—*Twomley v. Central Park, etc., R. Co.*, 69 N. Y. 158, 18 Am. Ry. Rep. 113.

Note.

Where a passenger, through the negligence of the carrier, is placed in a situation apparently so perilous as to render it prudent for him to leap from the train, whereby he is injured, he will be entitled to recover damages, although he would not have been hurt if he had remained on the train. So held in *St. Louis, etc., Ry. Co. v. Murray*, 55 Ark. 248, 18 S. W. 50.

Collision—Danger Only Apparent.—Where a passenger was injured while attempting to leave a moving street car which apparently was about to collide with a locomotive, the fact that the danger was only apparent did not make her action in leaving the car amount to contributory negligence. So held in *Selma St. & Sub. Ry. Co. v. Owen* (Ala.), 2 R. R. R. 97, 25 Am. & Eng. R. Cas., N. S., 97, 31 So. 598.

Leap from Rapidly Moving Train—Panic—Absence of Reasonable Cause—Negligence in Loading Lumber Car.—But if a passenger leaps from a car while the train is moving rapidly and is killed, when there is no reasonable cause to fear there is danger in remaining on the car, there can be no recovery for his death, even though the railroad was guilty of negligence in loading a lumber car, which, by reason of the lumber falling off and striking the car occupied by the passenger, caused the latter's alarm. So held in *Woolery v. Louisville, etc., R. Co.*, 107 Ind. 381, 8 N. E. 226.

Collision—Passenger Directed to Jump by Brakeman—Absence of Danger.—And in *McPeak v. Missouri Pac. R. Co.* (Mo.), 2 Am. & Eng. R. Cas., N. S., 226, it is held that conceding that the brakeman in question had authority to direct a passenger to jump off a moving train to avoid a collision and that he was acting in the line of his duty in so doing, the carrier would not be liable if there was no real danger, and the passenger, taking no precaution to ascertain if there was, jumped from the train in an opposite direction from that in which it was moving.

A. R. Y.

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No rate of speed of train moving through an open country is negligence. *Rutherford v. Iowa Cent. Ry. Co.* (Iowa), 647.

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Freight cars not in actual use may be attached. *De Rochemont v. New York Cent. & H. R. R.* (N. H.), 285.

Interstate Commerce Act is not in conflict with a state statute permitting the attachment of foreign cars when not in actual use. *De Rochemont v. New York Cent. & H. R. R.* (N. H.), 285.

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BAGGAGE.

See STATIONS AND DEPOTS.

Carrier's contract as to passenger's baggage is not determined alone by conditions in ticket, but also by the circumstances of each case. *Gomm v. Oregon R. & Nav. Co.* (Wash.), 495.

Checks.

Through ticket over lines of connecting carriers entitles passenger to have his baggage checked to his destination. *Gomm v. Oregon R. & Nav. Co.* (Wash.), 495.

BAGGAGE—Continued.**Damages.**

Mental suffering cannot be recovered for in action for damage to trunk and contents. *Chicago, etc., Ry. Co. v. Whitten (Ark.)*, 152.

Where railroad made an earnest effort to trace and deliver plaintiff's baggage, which had been miscarried, an inference of willful misconduct was not warranted, and punitive damages were not recoverable for delay in delivery. *Black v. Atlantic Coast Line R. Co. (S. Car.)*, 603.

Limiting Liability.

Condition in excursion ticket, sold at reduced rate, limiting carrier's liability for loss of baggage to \$100, was valid. *Gomm v. Oregon R. & Nav. Co. (Wash.)*, 495.

Contracts limiting a carrier's liability for baggage are to be construed in the light of public policy. *Gomm v. Oregon R. & Nav. Co. (Wash.)*, 495.

Passenger not assenting to or receiving any consideration for a contract limiting carrier's liability for baggage, is not bound thereby, even though the limitation be reasonable. *Black v. Atlantic Coast Line R. Co. (S. Car.)*, 603.

Where defendant sold through ticket over its own and connecting lines and return, and on starting on the return, the first carrier gave plaintiff a check good on its own line only, and the baggage was lost, defendant, notwithstanding a limitation of liability to loss on its line only contained on the ticket, was liable for the baggage under its contract of carriage. *Gomm v. Oregon R. & Nav. Co. (Wash.)*, 495.

What Is.

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BILLS OF LADING.

Carrier can deliver freight without surrender of the bill of lading, where the bill of lading provided for such delivery unless the word "order" was written thereon immediately before or after the name of the party to whose order the freight was consigned, and such word was not so written thereon. *St. Louis, S. F. R. Co. v. Mayer Bros. Co. (Kan.)*, 440.

Conclusiveness of recitals as to number of packages delivered for carriage. *Thomas v. Atlantic Coast Line R. Co. (S. Car.)*, 250.

Evidence.

Certain paper which had been recognized as valid by the carrier's agent at destination, and which was of the same effect as a regular printed bill of lading, it in addition to being a receipt, containing the specification, "as per conditions company's bill of lading," was admissible against the carrier, in action for failure to deliver part of shipment. *McMeekin v. Southern Ry. Co. (S. Car.)*, 441.

Transfer.

Delivery, without endorsement of a bill of lading, by the one entitled by its terms to the goods, will transfer his title. *McMeekin v. Southern Ry. Co. (S. Car.)*, 441.

Waiver of requirement that bill of lading must be endorsed. *McMeekin v. Southern Ry. Co. (S. Car.)*, 441.

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See ACTIONS; ATTACHMENT; BAGGAGE; BILLS OF LADING; CARRIERS OF LIVE STOCK; COMMON CARRIERS; CONNECTING CARRIERS; INTERSTATE COMMERCE; RAILROAD COMMISSIONS; STATIONS AND DEPOTS.

CARRIERS OF LIVE STOCK.

See COMMON CARRIERS.

Common law duty of carriers of live stock to feed, water and rest them. *Louisville & N. R. Co. v. Stiles, Gaddie & Stiles (Ky.)*, 231.

Degree of Care.

Carrier, after its agent saw plaintiff's jack become so frightened as to fall down in its crate, was bound to do every thing required by ordinary care to protect it from further injury. *Kelly v. Adams Express Co. (Ky.)*, 341.

Where cattle being transported by a carrier were unloaded for food, etc., in compliance with the federal statute, and while in the stock yards were burned in a conflagration which was not caused by any negligence of the carrier, it was, nevertheless, liable for the loss. *Louisville & N. R. Co. v. Stiles, Gaddie & Stiles (Ky.)*, 231.

Definition of "willfully" as used in U. S. Comp. St. Supp. 1007, p. 918, known as the "28-hour Law," which imposes a penalty on any carrier "knowingly and willfully" failing to comply with its provisions. *United States v. Union Pac. Co. (C. C. A.)*, 277.

Delay.

In action for delay in transporting horses, the evidence was sufficient to go to jury on amount of damages. *Jolliffe v. Northern Pac. R. Co. (Wash.)*, 228.

Delivery to Carrier.

Liability of carrier commences when stock is delivered to it at its stock pens or warehouses for shipment. *Louisville & N. R. Co. v. Stiles, Gaddie & Stiles (Ky.)*, 231.

Estoppel.

Where defendant undertook to use ordinary care in transporting plaintiff's jack, that plaintiff was present in the car and saw defendant fail to comply with the contract did not detract from defendant's liability, provided plaintiff's conduct did not amount to an estoppel. *Kelly v. Adams Express Co. (Ky.)*, 341.

Great and unusual press of business does not, unexplained and of itself, excuse the confinement of live stock by a railroad company beyond the 28 hours limited by the federal statute, nor constitute a defense to an action to recover the penalty for its violation. *United States v. Union Pac. R. Co. (C. C. A.)*, 277.

Limiting Liability.

Burden was on railroad of proving that the delay in question was not due to its own negligence, where horses were shipped under a written contract whereby shipper assumed all risk of damage from delay. *Jolliffe v. Northern Pac. R. Co. (Wash.)*, 228.

Exemption from all liability for injuries occurring to the stock disconnected from the conduct and running of the train, right to contract for. *St. Louis, etc., R. Co. v. Copeland (Okl.)*, 236.

Exemption from liability for gross negligence of carrier or its

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servants, right to contract for. *St. Louis, etc., R. Co. v. Copeland (Okl.)*, 236.

It could not be said as a matter of law that the acceptance and use of a return pass by a shipper of stock after the stock had been transported and delivered confirmed a voidable contract with the carrier under which the shipment was made, and which provided for the issuance of the pass. *St. Louis & S. E. R. Co. v. Gorman (Kan.)*, 333.

It could not be said as a matter of law that the shipper bound himself by certain preliminary negotiations to sign a special written contract limiting the carrier's common law liability. *St. Louis & S. F. R. Co. v. Gorman (Kan.)*, 333.

Notice of injury before removal of stock, application of contract clause requiring the giving of. *St. Louis, etc., R. Co. v. Copeland (Okl.)*, 236.

Regulations indorsed on contract, effect of. *St. Louis, etc., R. Co. v. Copeland (Okl.)*, 236.

Right of shipper to refuse to sign special contract, although he knows the custom of the carrier to require such contracts, etc. *St. Louis & S. F. R. Co. v. Gorman (Kan.)*, 333.

Validity of contract to which shipper was obliged to assent in order to secure transportation of his stock. *Cleveland, etc., Ry. Co. v. Hollowell (Ind.)*, 224.

Voidable special contract which has been extorted from shipper, who had rightfully declined to sign it, by means of a refusal to transport cattle already in the carrier's possession unless such contract was signed. *St. Louis & S. F. R. Co. v. Gorman (Kan.)*, 333.

Termination of Liability.

Where carrier has notified consignee of arrival of shipment and a reasonable time for him to receive it has elapsed, the liability of carrier becomes that of a warehouseman. *Louisville & N. R. Co. v. Stiles, Gaddie & Stiles (Ky.)*, 231.

Waiver of compliance with clause of contract requiring request that train shall stop in order to unload and feed, etc., shall be in writing. *St. Louis, etc., R. Co. v. Copeland (Okl.)*, 236.

CARRIERS OF PASSENGERS.

See BAGGAGE; IMPUTED NEGLIGENCE; LICENSEES; STATIONS AND DEPOTS; STREET RAILWAYS; TICKETS AND FARES.

Accidents on Track.

Carrier was bound to know that headlight would not accurately inform passenger, when crossing track to train, if he was an ordinary observer, of the distance of an approaching train from the depot. *Dieckmann v. Chicago & N. W. Ry. Co. (Iowa)*, 346.

Intervening tracks at station, duty to provide safe passage over and not to permit locomotives to pass over them while passengers are crossing. *Keifner v. Pittsburg, etc., Ry. Co. (Pa.)*, 220.

Negligence to fail to announce the train in time, or light the crossing or guide passengers across the tracks, where carrier required passengers to cross two tracks to another platform to take certain trains at station. *Dieckmann v. Chicago & N. W. Ry. Co. (Iowa)*, 346.

Street railway is liable for death of passenger who, while stand-

CARRIERS OF PASSENGERS—Continued.

ing on inside running board of open car, was struck by a car from opposite direction on the other track, if bell on such car was not sounded. *Kalis v. Detroit United Ry. (Mich.)*, 565.

Accompanying Passengers.

Status of, and care due persons at station for purpose of meeting and assisting passengers in such "friendly offices as may be reasonably necessary for their convenience, comfort and safety." *Arkansas & L. Ry. Co. v. Sain (Ark.)*, 579.

Arrests.

Carrier's duties to custodian of person under arrest. *Chesapeake & O. Ry. Co. v. Vaughn (Ky.)*, 558.

Assaults.

Carrier liable where brakeman without justification assaulted disorderly passenger after latter had been removed to another car. *Norfolk & W. Ry. Co. v. Brame (Va.)*, 529.

Carrier was liable for both the assault and arrest, where its passenger was knocked from car by conductor, and the assault was continued in the street, and on the approach of policeman the conductor directed him to arrest the passenger, which he did. *Louisville Ry. Co. v. Kupper (Ky.)*, 513.

Liability of carrier for arrest, assault and battery, and malicious prosecution, not directed nor instigated by it, and founded upon an alleged breach of the peace at one of its stations, in no way affecting or involving its property rights, etc., although plaintiff was rightfully in the station, having a ticket and awaiting the arrival of train, when assaulted. *McKain v. Baltimore & O. R. Co. (W. Va.)*, 542.

Liability of carrier for wrongful acts of special police officer appointed at instance of railroad company, under section 31 c., 145 W. Va. Code, 1899. *McKain v. Baltimore & O. R. Co. (W. Va.)*, 542.

Movement by disorderly passenger who had been removed from car, of his hand along his side to his hip pocket, did not justify brakeman in assaulting him, where such movement was accompanied by the statement, "I'll see you later." *Norfolk & W. Ry. Co. v. Brame (Va.)*, 529.

Street railway is bound to protect its passengers from violence and insults not only by strangers, but also from that of its own employees. *McMahon v. Chicago City Ry. Co. (Ill.)*, 536.

Street railway is not an insurer of its passengers against injury on its cars. *McMahon v. Chicago City Ry. Co. (Ill.)*, 536.

Assisting Passengers.

Duty of trainmen to assist sick or disabled passengers. *Sullivan v. Seattle Elec. Co. (Wash.)*, 163.

Assumption of Risk.

One who boards a crowded street car, knowing of a rule of the carrier that persons riding on platforms do so "at their own risk," must be held to assume the risk or injury resulting from his attempting to again board the car after leaving it to enable others to alight, though there was negligence in starting car. *Thompkins v. Boston Elev. Ry. Co. (Mass.)*, 487.

Risks assumed by passengers on freight train caboose. *Arkansas Cent. R. Co. v. Janson (Ark.)*, 481.

CARRIERS OF PASSENGERS—Continued.**Burden of Proof.**

Actual knowledge by carrier's servants of the peril of a passenger, sufficient to render carrier guilty of wanton negligence, so as to excuse contributory negligence, may be proved by circumstances. *Birmingham, etc., Co. v. Jung* (Ala.), 516.

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In action for injuries to a passenger on an electric car by collision with a locomotive at a steam railroad crossing, evidence was insufficient to show any negligence on part of street railway. *Gaines v. Chester Traction Co.* (Pa.), 574.

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Contributory Negligence.

Alighting from moving train. *Hoylman v. Kanawha & M. Ry. Co.* (W. Va.), 743.

Alighting from slowly moving train. *Sevier v. Southern Ry. Co.* (S. Car.), 198.

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Boarding moving car. *Birmingham, etc., Co. v. Jung* (Ala.), 516.

Burden on passenger to show that peculiar circumstances justified him in alighting from moving train. *Hoylman v. Kanawha & M. Ry. Co.* (W. Va.), 743.

Duty of passenger riding on rear platform of street car to examine fastenings of its gates. *Cincinnati Traction Co. v. Leach* (C. C. A.), 193.

Duty of passenger to inquire whether train on which he takes passage stops at his destination. *Black v. Atlantic Coast Line R. Co.* (S. Car.), 603.

One entering already crowded street car, and shoved off its crowded platform, where he was riding. *Lobner v. Metropolitan St. Ry. Co.* (Kan.), 473.

Passenger before crossing track at railroad station while taking or leaving train is not required, as a matter of law, to look and listen for approaching trains. *Chicago, etc., Ry. Co. v. Stepp* (C. C. A.), 207.

Passenger may assume that in going from station to his train across intervening tracks he will be protected from danger by carrier's agents. *Dieckmann v. Chicago & N. W. Ry. Co.* (Iowa), 346.

Passenger, though his destination is other than the station announced, may accept the invitation implied from its announcement, and rely upon the implied assurance of safety in alighting. *St. Louis, etc., Ry. Co. v. Glossup* (Ark.), 204.

Passenger thrown off rear platform of street car, by reason of the giving way of the platform gates, was not chargeable with negligence because he did not take the additional precaution to see and use handhold. *Cincinnati Traction Co. v. Leach* (C. C. A.), 193.

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- Riding on crowded street car, or platform of such car, on invitation of railway. *Lobner v. Metropolitan St. R. Co. (Kan.)*, 473.
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- Right of passenger when crossing intervening tracks to assume that his safety will not be endangered by passing trains. *Keifner v. Pittsburgh, etc., Ry. Co. (Pa.)*, 220.
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- Where negligence of carrier, resulting in injury to passenger, is established, the burden is on it to prove contributory negligence on part of passenger. *St. Louis, etc., Ry. Co. v. Gilbreath (Ark.)*, 201.

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- Exemplary damages, when recoverable for wrongs to passengers. *Chicago, etc., Ry. Co. v. Whitten (Ark.)*, 152.
- Mental suffering, where passenger was delayed in transportation, under the circumstances, there could be no recovery for. *Black v. Atlantic Coast Line R. Co. (S. Car.)*, 603.
- Punitive damages being authorized, verdict of \$2,500 was not excessive for ejection of passenger. *Louisville & N. R. Co. v. Cottongim (Ky.)*, 576.
- Punitive damages were properly allowed where it was shown that carrier's servant, in wrongfully ejecting plaintiff, handled him roughly, kicked and cursed him, etc. *Louisville & N. R. Co. v. Cottongim (Ky.)*, 576.

Degree of Care.

- Care due from carrier whose principal business is to transport its logs. *Campbell v. Duluth & N. E. R. Co. (Minn.)*, 490.
- Carrier is bound to provide a reasonably safe way for crossing, and to exercise the highest degree of care to protect passengers while they are crossing the tracks, where it requires passengers to cross two tracks to another platform to take certain trains. *Dieckmann v. Chicago & N. W. Ry. Co. (Iowa)*, 346.

CARRIERS OF PASSENGERS—Continued.

Carrier is liable for acts of its servant in charge of, or having control over passengers, amounting to a breach of the duty of transporting the passengers safely. *Louisville Ry. Co. v. Kupper* (Ky.), 513.

Carrier is not an insurer of safety of its passengers. *Thompkins v. Boston Elev. Ry. Co.* (Mass.), 487.

Due passengers on freight or mixed train. *Campbell v. Duluth & N. E. R. Co.* (Minn.), 490.

Due passengers on freight trains. *Arkansas Cent. R. Co. v. Janson* (Ark.), 481; *St. Louis, etc., Ry. Co. v. Gosnell* (Okla.), 587.

Evidence of care customary among well constructed and operated roads of the same class is admissible to show diligence, in action brought by passenger injured while riding on freight train of logging road. *Campbell v. Duluth & N. E. R. Co.* (Minn.), 490.

Highest degree of care must be used by carrier. *Fischer v. Columbia & P. S. R. Co.* (Wash.), 175.

Liability where person permitted to stand on platform of elevated street car placed her hand on door casing to save herself from being thrown as the car passed a curve, and her hand was injured by the door coming out of the socket and striking it, there being no evidence of negligence on part of trainmen. *Hunt v. Boston Elevated Ry. Co.* (Mass.), 182.

Railroad is required to exercise higher degree of care, skill, and foresight for safety of its passengers consistent with practical operation of its road. *Campbell v. Duluth & N. E. R. Co.* (Minn.), 490.

Required in furnishing and maintaining safe equipment for passengers. *Arkansas Cent. R. Co. v. Janson* (Ark.), 481.

Required in furnishing and maintaining safe track. *Arkansas Cent. R. Co. v. Janson* (Ark.), 481.

The standard of care has due regard to the circumstances, that is to say, "in reference to each particular the highest degree of care which can be exercised in that particular, with reasonable regard to the nature of the undertaking and the requirement of the business in all other respects," must be exercised. *Campbell v. Duluth & N. E. R. Co.* (Minn.), 490.

Where trolley of electric car left wire when car was passing over a steam railroad without negligence on part of street railway, and car was run into by locomotive, and there was nothing to show that the parting of the trolley was due to any defect in its construction or in lack of care, there could be no recovery for an injury sustained by a passenger on the electric car. *Gaines v. Chester Traction Co.* (Pa.), 574.

While common carrier is not insurer of passengers, it must exercise highest degree of human care and foresight for their safety. *Arkansas Cent. R. Co. v. Janson* (Ark.), 481.

Delay.

Carrier liable for injury to passenger caused by taking cold from being compelled to stay in car all night after the train had been derailed by carrier's negligence. *Arkansas Cent. R. Co. v. Janson* (Ark.), 481.

Liability for damages to passengers caused by unreasonable delay in transporting passengers. *Arkansas Cent. R. Co. v. Janson* (Ark.), 481.

Discharging Passengers.

Conductor of electric car, before giving signal for his car to resume its course after one or more passengers have alighted,

CARRIERS OF PASSENGERS—Continued.

- must look into the car to see if other passengers are in the act of alighting. *Bommarius v. New Orleans Ry. & Light Co.* (La.), 548.
- In action for carrying passenger beyond her destination, court properly refused to charge that if plaintiff, after being carried past her station, got off moving train voluntarily, and was not put off by defendant's agents or servants, jury must bring in verdict for defendant. *Louisville & N. R. Co. v. Seale* (Ala.), 594.
- Notice to conductor of passenger's desire to get off at flag station, taking up of ticket constituted. *Louisville & N. R. Co. v. Seale* (Ala.), 594.
- Street railway liable for injuries to passenger received while alighting from one of its cars, where, owing to negligence in operating its car, the passenger slipped on snow and ice for which the city was alone responsible. *Ward v. Chicago City Ry. Co.* (Ill.), 597.
- Duty of street railway, whose line is obstructed, when it voluntarily provides and points out to its passengers a path around the obstruction to a point where the railway is continued, as affected by fact that in making use of such path both the carrier and its passengers are trespassers. *Powers v. Old Colony St. Ry. Co.* (Mass.), 503.
- Duty of street railway whose line is obstructed, where it voluntarily provides and points out to its passengers a path around the obstruction to a point where the railway is continued. *Powers v. Old Colony St. Ry. Co.* (Mass.), 503.
- Ejection.**
- Certain allegations, which did not allege any contract to carry plaintiff as a passenger or any breach thereof, stated a cause of action *ex delicto*, and not *ex contractu*. *Reed v. Chicago, B. & Q. R. Co.* (Neb.), 469.
- Force in ejecting disorderly passengers, right to use. *Norfolk & W. Ry. Co. v. Brame* (Va.), 529.
- Tender of fare in question was sufficient, although made while trainmen had hold of plaintiff in process of ejecting him. *Louisville & N. R. R. v. Cottongim* (Ky.), 576.
- Unnecessary violence in removing disorderly passengers, liability of carrier for use of. *Norfolk & W. Ry. Co. v. Brame* (Va.), 529.
- Evidence.**
- Admissibility of certain evidence to show an invitation by a street railway to its passengers to use a path around obstruction in track to point where railway was continued. *Powers v. Old Colony St. Ry. Co.* (Mass.), 503.
- Admissibility of certain evidence to show condition of passenger, while on car, in action for his death, which resulted from his being permitted to alight at dangerous place while intoxicated. *Sullivan v. Seattle Electric Co.* (Wash.), 163.
- Exclamations of another passenger, made at about the time decedent left the car, that it was murder to let him alight at that place, was inadmissible, in action for death of passenger permitted to alight while intoxicated. *Sullivan v. Seattle Elec. Co.* (Wash.), 163.
- In action against street railway for injuries to passenger in scuffle between conductor and plaintiff's husband, arising out of a dispute as to transfers, evidence as to the dispute and of the conversations between all three parties was admissible as part of the *res gestæ*. *McMahon v. Chicago City Ry. Co.* (Ill.), 536.

CARRIERS OF PASSENGERS—Continued.

Invitation from carrier to passengers to take path around obstruction in route to take car on its other side, sufficiency of evidence of. *Powers v. Old Colony St. Ry. Co.* (Mass.), 503.

Jars and Jolts.

From the facts in question no inference of negligence, in causing jar of freight train, when it suddenly stopped at station, which caused passenger to fall while standing in car, could be drawn. *St. Louis, etc., Ry. Co. v. Gosnell* (Okl.), 587.

Mere fact that electric car started with a jerk and a passenger fell and was hurt does not make out a case of negligence in starting the car. *Boston Elev. Ry. Co. v. Smith* (C. C. A.), 551.

Question for jury whether jerking of train was negligent. *Miles v. St. Louis, etc., R. Co.* (Ark.), 184.

One who rides on crowded street car assumes the inconvenience resulting from its crowded condition, but the company is not, for that reason, relieved from the responsibility of using due care for the safety of the passengers invited upon such crowded car. *Lobner v. Metropolitan St. Ry. Co.* (Kan.), 473.

Overloading street cars as negligence. *Lobner v. Metropolitan St. Ry. Co.* (Kan.), 473.

Penal Statutes.

"Local freight" train, definition of. *State v. Missouri Pac. Ry. Co.* (Mo.), 131.

Train composed of an engine and tender, two or more freight cars, combined baggage, mail and passenger car, is a "passenger train," within Mo. Laws 1907, p. 180, requiring railroad carriers to run at least one passenger train over its road each way every day. *State v. Missouri Pac. Ry. Co.* (Mo.), 131.

"Train," "passenger train," and "regular," definitions of. *State v. Missouri Pac. Ry. Co.* (Mo.), 131.

Words "passenger train" and "regular passenger train" have no technical meaning in law, and are therefore to be construed in their ordinary sense. *State v. Missouri Pac. Ry. Co.* (Mo.), 131.

Presumption of Negligence.

Collision between cars, causing injury to passenger, casts upon carrier burden of showing that accident was not due to its negligence. *Parrent v. Rhode Island Co.* (R. I.), 489.

Injury to passenger caused by operation of train or its derailment. *Arkansas Cent. R. Co. v. Janson* (Ark.), 481.

Law will never presume negligence on carrier's part. *Kinlen v. Metropolitan St. Ry. Co.* (Mo.), 722.

Passenger killed on track by train under carrier's management and control. *Dieckmann v. Chicago & N. W. Ry. Co.* (Iowa), 346.

Showing that person was injured by operation of train, which she was attempting to board as a passenger, made out a prima facie case of negligence, so as to place the burden upon the company of negating negligence. *Miles v. St. Louis, etc., R. Co.* (Ark.), 184.

Where plaintiff shows that he was injured when a passenger, the burden shifts to defendant carrier to satisfy the jury by preponderance of the evidence that it was guilty of no negligence which proximately contributed to the injury. *Cincinnati Traction Co. v. Leach* (C. C. A.), 193.

Presumption that every passenger is sane and sober, right of conductor to act upon. *Sullivan v. Seattle Elec. Co.* (Wash.), 163.

CARRIERS OF PASSENGERS—Continued.**Receiving Passengers.**

Duties of carrier, with respect to starting car, when taking up passengers. *Birmingham, etc., Co. v. Jung* (Ala.), 516.

In action for injury to passenger, from negligence of carrier in failing to give him time to resume his place in cars after he had alighted on train stopping at siding, complaint sufficiently alleged defendant's negligence. *Birmingham, etc., Co. v. Jung* (Ala.), 516.

It is not negligence for conductor of an electric car to give starting signal after a passenger is fully and fairly upon the car, but before she has secured a seat. *Boston Elev. Ry. v. Smith* (C. C. A.), 551.

Railroad companies may properly designate on what trains passenger may be carried, and may exclude passengers from unscheduled extra freight trains. *Reed v. Chicago, B. & Q. R. Co.* (Neb.), 469.

Trainmen, operating freight train carrying passengers, must, after the caboose has been drawn up to a station to receive passengers, anticipate the presence of passengers in the caboose and exercise care not to injure them. *St. Louis, etc., Ry. Co. v. Gilbreath* (Ark.), 201.

Rules and Regulations.

Railroad may adopt rule that certain train shall not stop at designated station. *Black v. Atlantic Coast Line R. Co.* (S. Car.), 603.

Rule that persons riding on platforms of street cars do so at their own risk is reasonable and valid. *Thompkins v. Boston Elev. Ry. Co.* (Mass.), 487.

Wanton or willful misconduct of a carrier's servants can only be predicated on actual knowledge of the peril of the passenger subsequently injured. *Birmingham, etc., Co. v. Jung* (Ala.), 516.

Who Are Passengers.

Employees of quarry company, while riding on cars which railroad company permitted quarry company to operate on its track, were passengers of the railroad company. *Gregory v. Georgia Granite R. Co.* (Ga.), 454.

Intending passenger who, after trying to board train, was struck by train on intervening track as he was returning to station to wait for another train. *Chicago, etc., Ry. Co. v. Stepp* (C. C. A.), 207.

Neither master mechanic of a railroad, nor a conductor, nor an engineer of a train, has implied authority to agree on behalf of the company to carry a person on such train without payment of fare. *Clark v. Colorado & N. W. R. Co.* (C. C. A.), 463.

One who accepts an invitation from the master mechanic of a railroad and a conductor and an engineer of a train to ride in its engine cab without payment of fare is presumed to know that such invitation is without authority, and assumes all the known hazards incident to such exposed position; and there can be no recovery from the railroad for his death or injury, due to such dangerous position, unless caused by the wanton or reckless act of its servants. *Clark v. Colorado & N. W. R. Co.* (C. C. A.), 463.

Passenger is entitled to the exercise of the requisite care due a passenger from the time he enters the station to take passage. *Dieckmann v. Chicago & N. W. Ry. Co.* (Iowa), 346.

Person at depot who indicates his bona fide intention to take pas-

CARRIERS OF PASSENGERS—Continued.

- sage on train, within reasonable time before its departure. *Dieckmann v. Chicago & N. W. Ry. Co. (Iowa)*, 346.
- Person who has purchased ticket and is at station awaiting train. *Keifner v. Pittsburg, etc., Ry. Co. (Pa.)*, 220.
- Person who intended to become a passenger on freight train, but who accepted engineer's invitation to board and ride on engine, was one to whom company owed no affirmative duty, he being required to take notice that engineer was unauthorized to permit him to ride on engine. *Fischer v. Columbia & P. S. R. Co. (Wash.)*, 175.
- Policeman injured by derailment while riding on front platform of street car at conductor's request. *Goehring v. Beaver Valley Traction Co. (Pa.)*, 459.
- Street car passenger, riding on front vestibule, does not, by stepping off the car to enable some ladies to alight, cease to be a passenger. *Thompkins v. Boston Elev. Ry. Co. (Mass.)*, 487.

CATTLE GUARDS.

See FENCES; STOCK, INJURIES TO.

CHILDREN.

See IMPUTED NEGLIGENCE.

Contributory Negligence.

- At what age an infant is presumed to have sufficient capacity to be sensible of danger and power to avoid it is a question of law, and the inquiry as to at what age his responsibility for negligence must be presumed cannot be referred to the jury. *Baker v. Seaboard A. L. Ry. (N. Car.)*, 691.
- Boy of 14, permitted to ride, voluntarily jumping off work train while it was running at 30 miles an hour. *Baker v. Seaboard A. L. Ry. (N. Car.)*, 691.
- Care required of child ten years of age. *Texas & P. Ry. Co. v. Crump (Tex.)*, 687.
- Child three and a half years old could not be guilty of. *Miles v. St. Louis, etc., R. Co. (Ark.)*, 184.
- Degree of care required of child. *Baker v. Seaboard A. L. Ry. (N. Car.)*, 691.
- If child is directly injured by his own act, while the negligence of another was only such as to expose him to possibility of injury, he cannot recover. *Baker v. Seaboard A. L. Ry. (N. Car.)*, 691.
- In determining liability for death of boy who recklessly jumped from a rapidly moving train on which he was permitted to ride his motive for so doing is immaterial. *Baker v. Seaboard A. L. Ry. (N. Car.)*, 691.
- Presumption as to capacity of infant of 14 to be sensible of danger. *Baker v. Seaboard A. L. Ry. (N. Car.)*, 691.
- Responsibility of boy of 14 killed in jumping from rapidly moving train is not to be judged by the length of his experience with railroads. *Baker v. Seaboard A. L. Ry. (N. Car.)*, 691.
- Was question for jury in action for injuries sustained by child while playing on turntable. *Dampf v. Yazoo & M. V. R. Co. (Miss.)*, 696.
- Weight of evidence to rebut presumption of discreet judgment of infant over 14 years of age is for jury. *Baker v. Seaboard A. L. Ry. (N. Car.)*, 691.

CHILDREN—Continued.

Evidence showed that the trainmen as a matter of law owed no duty to child struck by train in railroad yard at night. *International, etc., R. Co. v. Vallejo (Tex.)*, 102.

Imputed Negligence.

Even if the mother's contributory negligence was a defense to an action by its administrator for a child's death, while a passenger, the burden of proving such contributory negligence was on the defendant railroad. *Miles v. St. Louis, etc., R. Co. (Ark.)*, 184.

Negligence of mother, in action by father as administrator of his child's estate, for its death by being jerked off the platform of caboose of freight train on which it had been placed by its mother. *Miles v. St. Louis, etc., R. Co. (Ark.)*, 184.

In case of injury to a trespasser or mere licensees on property of a railroad, his age is immaterial on question of railroad's negligence. *Arkansas & L. Ry. Co. v. Sain (Ark.)*, 579.

Lookouts.

Duty of trainmen to watch all children about railroad yards and tracks during the operation of their train. *International, etc., R. Co. v. Vallejo (Tex.)*, 102.

Railroad could not have been negligent to child run over by its cars when it owed it no duty. *International, etc., R. Co. v. Vallejo (Tex.)*, 102.

Turntables.

Evidence as to permission given to child to play on turntable by an employee of defendant was admissible, in action for injuries to child. *Dampf v. Yazoo & M. V. R. Co. (Miss.)*, 696.

Negligence of railroad was question for jury in action for injuries sustained by child while playing on turntable. *Dampf v. Yazoo & M. V. R. Co. (Miss.)*, 696.

COMMON CARRIERS.

See CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; CONNECTING CARRIERS; INTERSTATE COMMERCE.

Charges.

Right of carrier to compensation, in addition to the actual cost involved in taking loaded cars in transit to shipper's warehouse at an intermediate point for unloading, inspection, and reloading, and taking away the reloaded cars. *Southern Ry. Co. v. St. Louis Hay & Grain Co. (U. S.)*, 376.

Conversion.

After refusal of owner to accept freight because of delay in delivery, the carrier should safely store it, and so be able to keep its tender of it good; and having, instead, disposed of, and so converted the freight, it is liable for its value. *Chicago, etc., Ry. Co. v. Pfeifer & Bro. (Ark.)*, 434.

Damages.

Evidence, in action for delay in delivery of machinery to be used in mill in process of construction, did not show damages to the amount of the recovery to the business of building the mill. *McMeekin v. Southern Ry. Co. (S. Car.)*, 441.

Expenses of telephoning and telegraphing to locate delayed car. *Illinois Cent. R. Co. v. Hopkinsville Canning Co. (Ky.)*, 263.

Measure and elements of damages for delay in shipping goods. *Illinois Cent. R. Co. v. Hopkinsville Canning Co. (Ky.)*, 263.

COMMON CARRIERS—Continued.

Notice of possibility of special damages must be given to carrier before shipment. *McMeekin v. Southern Ry. Co. (S. Car.)*, 441.

Notice of special damages from delay, though given after the goods were lost, may be sufficient notice to carrier as to the need of haste as to a second shipment, made a few days later to supply the goods lost. *McMeekin v. Southern Ry. Co. (S. Car.)*, 441.

Possibility of special damages from delay in shipment must be given at or before shipment of the goods. *Franklin v. Louisville & N. R. Co. (Ky.)*, 446.

Shipper claiming special damages for delay in shipment of goods intended to be followed and sold by him at the point of destination cannot recover expenses incurred with knowledge of fact that the goods had been misdirected. *Franklin v. Louisville & N. R. Co. (Ky.)*, 446.

Shipper claiming special damages for delay in shipment of goods intended to be sold by him at destination cannot recover for loss of goods returned to him undamaged, in absence of proof that market price at point of destination was greater than at place of shipment. *Franklin v. Louisville & N. R. Co. (Ky.)*, 446.

Special damage to business from delay in delivering shipment of machinery, to be used in construction of mill, the business of which had not been launched, what is, and is not. *McMeekin v. Southern Ry. Co. (S. Car.)*, 441.

Special damages from delay in transportation, sufficiency of notice to carrier of special circumstances to warrant recovery of. *Illinois Cent. R. Co. v. Hopkinsville Canning Co. (Ky.)*, 263.

Special damages from shutting down cannery and spoiling of tomatoes, caused by delay in transportation, cannot be recovered, in absence of a showing that carrier had notice of facts which would have apprised a person of ordinary prudence that such loss should be anticipated from delay. *Illinois Cent. R. Co. v. Hopkinsville Canning Co. (Ky.)*, 263.

Degree of Care.

Carrier is an insurer in absence of contract to the contrary. *Merchants' and Miners' Transportation Co. v. Eichberg (Md.)*, 259.

Fruit and other perishable freight, carrier is not an insurer of and only liable for negligence. *Philadelphia, etc., Co. v. Diefendal (Md.)*, 364.

Delay.

Owner of freight may not, because of delay of the carrier in delivering it, refuse to receive it, and sue the carrier for the value of the goods, though he has been obliged to buy other like goods, but he should accept and sue for damages. *Chicago, etc., Ry. Co. v. Pfeifer & Bro. (Ark.)*, 434.

Persons entitled to sue for delay in shipment. *Illinois Cent. R. Co. v. Hopkinsville Canning Co. (Ky.)*, 263.

Delivery by Carrier.

Duty of carrier to deliver freight to the proper party is absolute. *Chicago, etc., Ry. Co. v. Pfeifer & Bro. (Ark.)*, 434.

Notice of arrival of goods at destination, liability of carrier for failure to give where it is customary. *Illinois Cent. R. Co. v. Hopkinsville Canning Co. (Ky.)*, 263.

When the addressing of package to consignee in the care of third

COMMON CARRIERS—Continued.

person confers upon the latter the right to receive the goods. *Commonwealth v. People's Express Co.* (Mass.), 407.

Delivery to Carrier.

Evidence was sufficient to prove that defendant carrier received the box in question, though thirty days after delivery of the other part of the shipment to plaintiff, at which time defendant could not find the box, it was found in the possession of another carrier at its destination. *Chicago, etc., Ry. Co. v. Pfeifer & Bro.* (Ark.), 434.

Discrimination.

Common law right of carrier to demand the prepayment of the freight charges of one and to give credit to another similarly situated. *Gamble-Robinson Com. Co. v. Chicago & N. W. Ry. Co.* (C. C. A.), 420.

Duty to Furnish Facilities.

Duty of railroads to equip themselves with sufficient cars to supply demands for shipments, both interstate and intrastate. *Oliver & Son v. Chicago, etc., Ry. Co.* (Ark.), 449.

Failure to furnish cars, under the Arkansas statute requiring railroads to furnish them within a certain period, merely establishes prima facie a breach of duty, which will not preclude the right to set up such defense as will excuse or justify the failure. *Oliver & Son v. Chicago, etc., Ry. Co.* (Ark.), 449.

Evidence.

Paper, purporting to be notice to carrier of special damages to plaintiff, though only a copy, being identified by carrier's agent, is admissible against it, on its failure to produce the original. *McMeekin v. Southern Ry. Co.* (S. Car.), 441.

Limiting Liability.

Agreed valuation of freight. *Black v. Atlantic Coast Line R. Co.* (S. Car.), 603.

Assent by shipper to stipulation in bill of lading will be presumed from his signature of the stipulation, in the absence of fraud or imposition. *Baker v. Atlantic Coast Line R. Co.* (S. Car.), 603.

Burden was on shipper to show, not only injury to the goods, but negligence causing such injury, under a bill of lading providing that negligence should not be presumed against the carrier, where a higher rate was charged under the common-law liability as insurer. *Merchants' and Miners' Transportation Co. v. Eichberg* (Md.), 259.

Carrier can contract so as to put the burden of proving its negligence on one suing therefor. *Merchants' and Miners' Transportation Co.* (Md.), 259.

Negligence of carrier. *Black v. Atlantic Coast Line R. Co.* (S. Car.), 603; *Jolliffe v. Northern Pac. Co.* (Wash.), 228.

Validity of clause of bill of lading providing that any loss or damage should be computed at the value of the property at the time and place of shipment. *Merchants' and Miners' Transportation Co. v. Eichberg* (Md.), 259.

Waiver of provision of bill of lading requiring claim for loss or damage to be made in writing within thirty days after delivery of freight to consignee. *Merchants' and Miners' Transportation Co.* (Md.), 259.

COMMON CARRIERS—Continued.

Waiver of provision of bill of lading that amount of damage should be computed at the value of property at the time and place of shipment. *Merchants' and Miners' Transportation Co. v. Eichberg (Md.)*, 259.

Rates.

Carrier is as much entitled to be paid a premium for its safe delivery of goods as for labor and expense of carrying them. *Merchants' and Miners' Transportation Co. v. Eichberg (Md.)*, 259.

State Regulation Of.

Constitutionality of section 30, art. 16, of the Constitution of Florida. *State v. Florida East Coast Ry. Co. (Fla.)*, 269.

Discretion of common carrier in the discharge of its duties to the public is subject to review and to lawful regulation. *State v. Florida East Coast Ry. Co. (Fla.)*, 269.

Those who devote their property to the uses of common carriers do so subject to the right of governmental regulation in the interest of the common welfare. *State v. Florida East Coast Ry. Co. (Fla.)*, 269.

Validity of regulation as affected by mere fact that it causes a pecuniary loss to a common carrier. *State v. Florida East Coast Ry. Co. (Fla.)*, 269.

Stoppage in Transitu.

Change of relation between buyer and carrier to the prejudice of the seller's right of stoppage in transitu, power to effect. In re *New York House Furnishing Goods Co. (C. C. A.)*, 254.

So long as goods are in carrier's custody, whether as carrier or warehouseman, at destination, the right of stoppage may be exercised. In re *New York House Furnishing Goods Co. (C. C. A.)*, 254.

The goods in question being still in the carrier's possession, the right of stoppage still existed, notwithstanding they were levied upon while still in the cars after arrival at destination. In re *New York House Furnishing Goods Co. (C. C. A.)*, 254.

CONNECTING CARRIERS.

See **BAGGAGE**.

Burden of Proof.

Presumption that goods were received by terminal carrier in same condition in which they were delivered to initial carrier. *Philadelphia, B. & W. R. Co. v. Diffendal (Md.)*, 364.

Damages.

Connecting carrier was responsible for loss sustained by reason of its failure to deliver freight within reasonable time, whether by a falling in market price of the goods or by damages thereto or by a combination of both causes. *Philadelphia, B. & W. R. Co. v. Diffendal (Md.)*, 364.

Initial carrier is alone liable for expenses incurred by the consignee in removing the goods where such expenses would not have been incurred if the initial carrier had not made a mistake in routing the goods. *Illinois Cent. R. Co. v. Hopkinsville Canning Co. (Ky.)*, 263.

Market value of the peaches, delayed in transit and delivered in damaged condition owing to defendant terminal carrier's, failure to re-ice car, at destination on a certain date, was the

CONNECTING CARRIERS—Continued.

proper measure of damages, though defendant had no notice that the peaches were intended for market on that day, or that by the exercise of due diligence the peaches could have been delivered in time for that market. *Philadelphia, B. & W. R. Co. v. Diffendal* (Md.), 364.

Delay.

Where goods are routed over a particular railroad, and by mistake the initial carrier routes them over another, which delays them in transit, the initial carrier is liable with the latter railroad jointly for the delay. *Illinois Cent. R. Co. v. Hopkinsville Canning Co.* (Ky.), 263.

Liability of Connecting Carrier.

Failure of terminal carrier to properly re-ice car of peaches on accepting it for transportation, and to deliver the peaches in proper condition rendered such carrier liable for resulting damages. *Philadelphia, B. & W. R. Co. v. Diffendal* (Md.), 364.

Implied notice to terminal carrier, from character of car, that it contained perishable freight, so that by accepting the car it undertook to exercise reasonable diligence to protect the peaches it contained, and to deliver them to the consignee within a reasonable time. *Philadelphia, B. & W. R. Co. v. Diffendal* (Md.), 364.

Liability of Initial Carrier.

Evidence showed that fruit was delivered to initial carrier in sound condition. *Philadelphia, B. & W. R. Co. v. Diffendal* (Md.), 364.

CONSTITUTIONAL LAW.

See COMMON CARRIERS; FIRES SET BY LOCOMOTIVES; INTERSTATE COMMERCE; INTOXICATING LIQUORS; RAILROAD COMMISSIONS.

Constitutionality of the Hepburn act of June 29, 1906, making it unlawful for a railway carrier to transport in interstate commerce articles, manufactured, mined or produced by it, etc. *United States v. Delaware & H. Co.* (U. S.), 380.

Federal Supreme Court will not consider the question of the constitutionality of the clause of the Hepburn act of June 29, 1906, imposing penalties for violation of its provisions forbidding railway carriers from transporting in interstate commerce commodities with which they are associated or in which they are interested, in an action seeking to enforce such provisions by injunction or mandamus, in which no recovery of penalties is sought. *United States v. Delaware & H. Co.* (U. S.), 380.

Right of congress to enact so much of the Hepburn act of June 29, 1906, as forbids a railway carrier from transporting articles in interstate commerce when such articles have been manufactured, mined, or, produced by the carrier, etc., as affected by fact that, by existing state legislation, such carrier may have a lawful right of ownership of or association with the articles upon which such provisions operate. *United States v. Delaware & H. Co.* (U. S.), 380.

CONTRACTS.

See RIGHT OF WAY.

CONTRIBUTORY NEGLIGENCE.

See ACCIDENTS ON TRACK; CARRIERS; CARRIERS OF PASSENGERS; CHILDREN; CROSSINGS; IMPUTED NEGLIGENCE; MASTER AND SERVANT; NEGLIGENCE; STREET RAILWAYS.

Burden of Proof.

Contributory negligence must be proved by either direct or circumstantial evidence. *St. Louis, etc., Ry. Co. v. Gilbreath* (Ark.), 201.

Contributory negligence is not chargeable to one who rides in a vehicle with its driver and is injured, by the negligence of a third person to which the negligence of the driver contributed, unless he had, or was in a position to have and exercise, some control over the driver as to the matter wherein he was negligent. *Wilson v. Puget Sound Elec. Ry. Co.* (Wash.), 311.

Emergencies.

Rule that one in an emergency or great peril need not exercise the care required of prudent persons in ordinary circumstances does not apply where his fault has created the peril, it applying only where he has been placed in the perilous situation by defendant's negligence. *Chesapeake & O. Ry. Co. v. Hall's Adm'r* (Va.), 638.

Where one places another in position of peril, it is question for jury whether or not latter acted in the manner one placed in a dangerous position is likely to act. *Kern v. Des Moines City Ry. Co.* (Iowa), 29.

How established. *Grimm v. Milwaukee Elec. Ry. & L. Co.* (Wis.), 665.

Is not available against charge of willful or wanton misconduct. *Birmingham, etc., Co. v. Jung* (Ala.), 516.

Lack of vigilance or a negligent failure to act may constitute contributory negligence as well as negligent action. *Douglass v. Southern Ry. Co.* (S. Car.), 66.

Nonsuit on ground of, when court should not grant. *Grimm v. Milwaukee Elec. Ry. & L. Co.* (Wis.), 665.

Question for jury, when. *Colorado Midland Ry. Co. v. Brady* (Colo.), 113.

When question of fact and when question of law. *Dieckmann v. Chicago & N. W. Ry. Co.* (Iowa), 346.

When question of law. *St. Louis, etc., R. Co. v. Copeland* (Okl.), 236.

CORPORATIONS.

See RAILROADS.

CRIMINAL LAW.

See NUISANCES; RAILROADS.

CROSSINGS.

See FENCES; FRIGHTENING TEAMS; LEASES AND RUNNING POWERS; NUISANCES; RAILROADS; RAILROADS IN STREETS; STREET RAILWAYS.

Construction and Maintenance.

Railroad in constructing or maintaining highway crossings need not provide facilities for vehicles other than those in common use in the locality. *St. Louis & S. F. R. Co. v. Dyer* (Ark.), 52.

Railroads must use ordinary care to keep highway crossings in reasonably safe condition for travel and crossing. *St. Louis & S. F. R. Co. v. Dyer* (Ark.), 52.

CROSSINGS—Continued.**Contributory Negligence.**

Assumption by highway traveler that train is not being run towards the crossing with reckless disregard of its dangers.

Stearns v. Boston & M. R. R. (N. H.), 55.

Attempting to cross track with knowledge of approaching train.

Dieckmann v. Chicago & N. W. Ry. Co. (Iowa), 346.

Automobile driver took chances rather than precautions, and was chargeable with contributory negligence, which precluded recovery for his injury inflicted by train. *New York Cent. & H. R. R. Co. v. Maidment* (C. C. A.), 681.

Circumstances warranted finding that decedent knew the time it took the train which killed him, as it should have been and was customarily run, to reach the crossing, even if he was not led to believe by absence of station whistle that it would slow down for a stop, and being aware of the speed of the train, judged there was time to cross. *Stearns v. Boston & M. R. R.* (N. H.), 55.

Decedent was guilty of negligence precluding recovery, for her death, caused by her being struck by an east-bound train while attempting to drive across track, where she knew that a train was approaching, though, on hearing that a train was approaching, she believed it was west-bound, where she could have seen the train which struck her in time to avoid it had she looked in the proper direction. *Chesapeake & O. Ry. Co. v. Hall's Adm'r* (Va.), 638.

Driving upon track with knowledge of train's approach. *Stearns v. Boston & M. R. R.* (N. H.), 55.

Duty of highway traveler to anticipate that train may be running at excessive speed, and may reach the crossing before he can safely use it. *Grimm v. Milwaukee Elec. Ry. & L. Co.* (Wis.), 665.

One who seeing that a train is coming attempts to cross track just in front of it at a station, is guilty of contributory negligence, barring recovery, though it was a fast special running on the time of a regular train, and he may have thought it was the regular, which was to have stopped there. *Louisville & N. R. Co. v. Tower's Adm'r* (Ky.), 657.

Right of highway traveler to assume that railroad will obey the law and give warning of approach of trains by proper signals or by presence of flagman. *Henry v. Cleveland, etc., Ry. Co.* (Ill.), 48.

Right of highway traveler to rely on operations of crossing gates or that trainmen will look out for his safety. *Louisville & N. R. Co. v. Roth* (Ky.), 610.

That one of the horses of person killed at crossing was somewhat afraid of cars, effect of fact. *Stearns v. Boston & M. R. R.* (N. H.), 55.

Those in charge of traction engine were not bound to reject the only railroad crossing reasonably accessible unless the danger was so apparent that one of ordinary prudence would not have attempted to use it. *St. Louis & S. F. R. Co. v. Dyer* (Ark.), 52.

Damages.

The actual damages found being \$3,000, and the gross negligence being in leaving up the gates at crossing, allowing team to get in front of train, allowance of \$2,000 punitive damages is not excessive. *Louisville & N. R. Co. v. Roth* (Ky.), 610.

Discovered Peril.

Failure to stop train after danger to highway traveler became

CROSSINGS—Continued.

apparent cannot be held to be cause of collision with him where the only situation in which the train could have been stopped must have been one from which no injury would have resulted. *Stearns v. Boston & M. R. R.* (N. H.), 55.

Last clear chance doctrine cannot be applied to action for death of one killed while attempting to cross track in front of train, though its fireman saw her approaching, where, when he realized that she was going to attempt to cross, it was too late to warn her. *Chesapeake & O. Ry. Co. v. Hall's Adm'r* (Va.), 638.

Liability where trainmen after they discover, or should discover danger of highway traveler, can prevent injury to him by due care, and fail to do so. *Stearns v. Boston & M. R. R.* (N. H.), 55.

Railroad could not be held liable, under the circumstances stated, on the ground that, after discovery of the traveler's danger, the engineer might by exercise of due care have avoided the collision with him. *Stearns v. Boston & M. R. R.* (N. H.), 55.

Right of fireman to assume that highway traveler would not attempt to cross track in front of train, which was rapidly approaching in plain view. *Chesapeake & O. Ry. Co. v. Hall's Adm'r* (Va.), 638.

Where, if trainmen ought to have recognized the danger of highway traveler when they were at a certain point, they could not have stopped the train by applying brakes, it is immaterial that they did not do so until train was nearer the crossing. *Stearns v. Boston & M. R. R.* (N. H.), 55.

Gates.

Gross negligence authorizing punitive damages, where, through reckless inattention to duty of one stationed at a railroad crossing, to operate the gates, they are left up when a train is approaching and a team is allowed to drive in front of it, a view of it from the team being obstructed by cars on siding. *Louisville & N. R. Co. v. Roth* (Ky.), 610.

Question for jury whether defendant railroad was negligent in maintaining a dangerous country crossing without safety devices. *Folkmire v. Michigan United Rys. Co.* (Mich.), 328.

Intersecting Railroads.

Certain statute requires that not only the cost of constructing such crossing as the court may order, but also the cost of maintaining it, shall be equitably distributed between a junior and senior railroad company when they can not agree as to a method of crossing. *Cincinnati, etc., Co. v. Pittsburg, etc., Ry. Co.* (Ohio), 618.

Companies' duty to public to keep interlocking device in order. *Gulf, etc., Co. v. Barnes* (Miss.), 620.

In a proceeding under section 3333-1, Ohio Rev. St. 1908, where a junior and senior railroad are not able to agree as to a method of crossing, if the junior railroad desires a lesser grade than a reasonably practicable one, it may be charged with the entire additional expense of such construction. *Cincinnati, etc., Co. v. Pittsburg, etc., Ry. Co.* (Ohio), 618.

In a proceeding under certain statute, where a junior and senior railroad company cannot agree as to a method of crossing, where the junior road has projected and is engaged in constructing a double track road, the cost of a crossing sufficient in width to carry a double track should be equitably appor-

CROSSINGS—Continued.

tioned between the companies. *Cincinnati, etc., Co. v. Pittsburg, etc., Ry. Co.* (Ohio), 618.

Lookouts.

Railroad is not required to keep lookout for landowner on track at private farm grade crossing. *Rutherford v. Iowa Cent. Ry. Co.* (Iowa), 647.

Negligence and Contributory Negligence.

Negligence of railroad to traveler approaching a crossing does not excuse him from performing his reciprocal duties, and is not actionable, unless proximate cause of his injury. *Chesapeake & O. Ry. Co. v. Hall's Adm'r* (Va.), 638.

Private Crossings.

Railroad company is not required to use the same care towards persons using private crossings as towards those using public ones. *Rutherford v. Iowa Cent. Ry. Co.* (Iowa), 647.

Signals.

Certain allegation of complaint was insufficient to show any failure of duty by railroad or its employees toward deceased. *Lynch v. Great Northern Ry. Co.* (Mont.), 672.

Failure to give was not proximate cause of accident, where decedent saw train by which he was struck in time to have avoided it. *Rutherford v. Iowa Cent. Ry. Co.* (Iowa), 647.

Failure to give where decedent was not killed at crossing, effect of. *Lynch v. Great Northern Ry. Co.* (Mont.), 672.

Liability for death at highway crossing for failure to give statutory train signals, if another or other warnings were given which notified decedent of train's approach, or would have given her such notice if she had used ordinary care, so that she could have avoided the accident. *Chesapeake & O. Ry. Co. v. Hall's Adm'r* (Va.), 638.

Liability on account of failure to give train signals where highway traveler was aware of train's approach in time to protect himself. *Stearns v. Boston & M. R. R.* (N. H.), 55.

Question for jury where conflict between positive and negative testimony as to whether or not train signals were given. *Chicago, etc., Ry. Co. v. Stepp* (C. C. A.), 207.

Speed.

Action of train under application of brakes is not matter of common knowledge. *Stearns v. Boston & M. R. R.* (N. H.), 55.

Operation of electric car in the country at a speed of 40 or 50 miles an hour over a crossing at which plaintiff's decedent was killed may have been negligence, but was not negligence per se. *Folkmire v. Michigan United Rys. Co.* (Mich.), 328.

Question for jury whether speed of train could have been checked sufficiently to have permitted person killed at crossing to cross in safety. *Stearns v. Boston & M. R. R.* (N. H.), 55.

Trainmen were not required to slacken speed of train when approaching private crossing until presence of decedent and his cattle on track was actually discovered. *Rutherford v. Iowa Cent. Ry. Co.* (Iowa), 647.

Under Miss. Code 1906, § 4043, a railroad is liable for injuries to a highway traveler where at the time the danger was discovered the train was running at an unlawful speed, though at the time of the collision it was running at a lawful speed. *Louisville & N. R. Co. v. Dick* (Miss.), 679.

CROSSINGS—Continued.**Stop, Look, and Listen.**

Care required of traveler at street car tracks. *Grimm v. Milwaukee Elec. Ry. & L. Co.* (Wis.), 655.

Care required of highway travelers to discover trains. *Grimm v. Milwaukee Elec. Ry. & L. Co.* (Wis.), 665.

Degree of care required of highway traveler. *Louisville & N. R. Co. v. Roth* (Ky.), 610.

Failure to look and listen for trains will not necessarily bar recovery. *Henry v. Cleveland, etc., Ry. Co.* (Ill.), 48.

Highway traveler must look in every direction that the rails run, and to look and listen where such acts will be effective. *Chesapeake & O. Ry. Co. v. Hall's Adm'r* (Va.), 638.

If by proper use of his faculties a highway traveler can avoid being struck by a train, he is guilty of negligence precluding recovery in not using them. *Chesapeake & O. Ry. Co. v. Hall's Adm'r* (Va.), 638.

Killed by electric car, which was in plain sight and easily avoidable before decedent attempted to drive over a country crossing. *Folkmore v. Michigan United Rys. Co.* (Mich.), 328.

Law exacts from driver of automobile a strict performance of the duty to stop, look, and listen before driving upon railroad crossing, where the view is obstructed; and requires him to do so at time and place where such precautions will be effective. *New York Cent. & H. R. R. Co. v. Maidment* (C. C. A.), 681.

Question for jury whether decedent was negligent in failing to look and listen for trains. *Henry v. Cleveland, etc., Ry. Co.* (Ill.), 48.

Question for jury whether person of ordinary prudence would have diverted his attention from his team and again looked at the train just before driving upon track. *Stearns v. Boston & M. R. R.* (N. H.), 55.

DAMAGES.

See ANIMALS; BAGGAGE; CARRIERS; CROSSINGS; PERSONAL INJURIES; RAILROADS IN STREETS.

Evidence.

To submit the question of compensation for permanent injuries it is not required that expectancy of life shall be shown by life tables. *St. Louis, etc., Ry. Co. v. Glossup* (Ark.), 204.

Punitive Damages.

Amount of punitive damages is in the sound discretion of jury, with the limitation that they must not be so excessive as to indicate influence by passion or prejudice. *Louisville & N. R. Co. v. Roth* (Ky.), 610.

Punitive damages, allowable in case of gross negligence, may be allowed for omission, as well as commission. *Louisville & N. R. Co. v. Roth* (Ky.), 610.

Where joint tort-feasors are sued in same action, separate verdicts for different amounts may be awarded against them, and punitive damages allowed against one, and not against the other. *Louisville & N. R. Co. v. Roth* (Ky.), 610.

DEATH BY WRONGFUL ACT.**Evidence.**

Testimony of physician giving description of wounds of deceased as evidence to explain how and where he was struck by street car. *Kern v. Des Moines City Ry. Co.* (Iowa), 29.

DISCRIMINATION.

See INTERSTATE COMMERCE.

DOGS.

See ANIMALS.

EJECTMENT.

See EMINENT DOMAIN.

EMINENT DOMAIN.

See RIGHT OF WAY.

Damages.

Measure of the damages from noise, smoke, vibration, etc., incident to operation of railroad, rule for estimating. *Helmer v. Colorado, etc., R. Co. (La.)*, 5.

Noise, smoke, vibration, etc., incident to operation of railroad, as elements of damages, under article 167 of the Constitution of 1898 of Louisiana. *Helmer v. Colorado, etc., R. Co. (La.)*, 5.

Ejectment is the property owner's remedy where railway company has entered land under a claim of right to do so, and has constructed a road thereon, and is operating it under a legislative charter. *Porter v. Aberdeen & R. F. R. R. (N. Car.)*, 1.

EVIDENCE.

See CARRIERS; COMMON CARRIERS; CROSSINGS; DEATH BY WRONGFUL ACT; FIRES SET BY LOCOMOTIVES; STOCK, INJURIES TO; STREET RAILWAYS.

Competent for engineer to testify that train bell was ringing on occasion in question, relying on his habit of ringing the bell to sustain him in such conclusion. *Texas & P. Ry. Co. v. Crump (Tex.)*, 687.

Expert Testimony.

Expert trainman may be asked, at the trial of a case under the federal safety appliance act, as to the condition of the car coupler in question, and as to what was necessary in order to operate such coupler. *Wabash R. Co. v. United States (C. C. A.)*, 305.

Res gestæ are those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. *McMahon v. Chicago City Ry. Co. (Ill.)*, 536.

Res gestæ, what constitute. *McMahon v. Chicago City Ry. Co. (Ill.)*, 536.

EXECUTION.

See JUDICIAL SALES; RAILROADS.

EXPRESS COMPANIES.

See INTOXICATING LIQUORS.

FEDERAL STATUTES.

See CARRIERS OF LIVE STOCK.

FENCES.

See STOCK, INJURIES TO.

Cattle Guards.

Railroad is not required to construct cattle guards and wing fences at private crossing in country, either by common law,

FENCES—Continued.

or by Iowa Code, §§ 2022, 2054, 2057, in absence of request from landowner. *Rutherford v. Iowa Cent. Ry. Co. (Iowa)*, 647.

Gates.

Evidence failed to establish any negligence on part of railroad in maintaining proper gate in right of way fence, or in keeping such gate closed. *Wallace v. Oregon Short Line R. Co. (Idaho)*, 712.

FIRES SET BY LOCOMOTIVES.

See TRIAL.

Burden of Proof.

In action against railroad for burning plaintiff's property, the burden is on defendant to show want of negligence. *Chenoweth v. Southern Pac. Co. (Ore.)*, 703.

Certain evidence warranted a finding that the cotton seed in question was upon the right of way with the railroad company's consent, so as not to fall within the exception to S. Car. Civ. Code 1902, § 2135. *Hutto v. Seaboard A. L. Ry. (S. Car.)*, 78.

Complaint did not state a cause of action under S. Car. Civ. Code 1902, § 2135, making a railroad liable for damages by fire communicated by its engines or originating on its right of way, except where the property damaged shall have been placed on its right of way unlawfully or without its consent. *Hutto v. Seaboard A. L. Ry. (S. Car.)*, 78.

Constitutionality of Arkansas act April 18, 1907, making railroads liable for damages caused by fire from locomotives in the operation of their roads. *St. Louis & S. F. Ry. Co. v. Shore (Ark.)*, 699.

Constitutionality of statute imposing liability for damages caused by fire in the operation of a railroad, as affected by its invalidity when applied to operators of railroads other than railroad companies. *St. Louis & S. F. Ry. Co. v. Shore (Ark.)*, 699.

Evidence.

Proof of fires caused by other engines in the vicinity of the fire in question and about that time is an element tending to strengthen the presumption of negligence in equipping and operating defendant's engines generally. *Chenoweth v. Southern Pac. Co. (Ore.)*, 703.

That defendant's engines just prior or subsequent to the fire in question scattered sparks is not sufficient to impute negligence. *Chenoweth v. Southern Pac. Co. (Ore.)*, 703.

Limiting Liability.

Person who stored cotton seed in house erected on railroad's right of way under an agreement between it and a third person that latter should not assign or underlet the premises, and that railroad should not be liable for loss by fire, without knowledge of such agreement, was not bound thereby. *Hutto v. Seaboard A. L. Ry. (S. Car.)*, 78.

Origin of Fire.

Certain circumstantial evidence was sufficient to go to jury on the question of whether the fire was communicated from the locomotive in question. *Hutto v. Seaboard A. L. Ry. (S. Car.)*, 78.

Presumption of Negligence.

Communication of fire by a locomotive is prima facie evidence of negligence which casts the burden on the railroad company

FIRES SET BY LOCOMOTIVES—Continued.

to show that the locomotive was constructed, equipped, and managed with due care. *Hutto v. Seaboard A. L. Ry. (S. Car.)*, 78.

Prima facie case for plaintiff, established by evidence that his property was destroyed by fire from defendant's locomotive, and direct evidence of defendant's care and diligence make question for jury. *Chenoweth v. Southern Pac. Co. (Ore.)*, 703.

Prima facie case established by evidence that plaintiff's property was destroyed by fire from defendant's locomotive. *Chenoweth v. Southern Pac. Co. (Ore.)*, 703.

Rebuttal of presumption of negligence created by fact that fire was set by locomotive, sufficiency of evidence to effect. *Chenoweth v. Southern Pac. Co. (Ore.)*, 703.

Series of fires along railroad right of way at or about the time of the fire in question. *Lillard v. Chicago, etc., Ry. Co. (Kan.)*, 84.

FOREIGN CORPORATIONS.

See RAILROADS.

FRANCHISES.

See RAILROADS IN STREETS.

FREE PASSES.

See TICKETS AND FARES.

FRIGHTENING TEAMS.

Railroad was liable for injuries to team which became frightened by train and ran on track in front of it, as the driver had the right to demand the giving of the statutory train signals. *Skipworth v. Mobile & O. R. Co. (Miss.)*, 697.

GROSS NEGLIGENCE.

See CROSSINGS; DAMAGES; NEGLIGENCE.

HACKMEN.

See STATIONS AND DEPOTS.

"HEPBURN ACT."

See CONSTITUTIONAL LAW; INTERSTATE COMMERCE.

IMPUTED NEGLIGENCE.

See CHILDREN.

Chauffeur's negligence is not, under the law of Washington, imputable to his passenger, killed in a collision between the automobile and a street car. *Wilson v. Puget Sound Elec. Ry. Co. (Wash.)*, 311.

Driver was not under plaintiff's control, and his negligence when attempting to drive across street car track could not be imputed to her. *Peabody v. Haverhill, etc., Ry. Co. (Mass.)*, 26.

Negligence of defendant railroad in failing to keep in order an interlocking device at a crossing of another company's tracks does not affect the right of defendant's passengers to recover from the other company for their injuries, sustained in a collision at such crossing. *Gulf, etc., R. Co. v. Barnes (Miss.)*, 620.

Negligence of defendant railroad in failing to keep in order an interlocking device at a crossing of another company's track does not affect the right of defendant's trainmen, who were injured

IMPUTED NEGLIGENCE—Continued.

- in a collision at such crossing, to recover from the other company. *Gulf, etc., Co. v. Barnes* (Miss.), 620.
- Parent and child riding in vehicle driven by one of them upon street car track. *Peabody v. Haverhill, etc., Ry. Co.* (Mass.), 26.
- Passenger in automobile run for hire is not liable for the negligence of its chauffeur unless he failed to exercise ordinary care by doing or failing to do something he should have done at the time as an ordinarily prudent person. *Wilson v. Puget Sound Elec. Ry. Co.* (Wash.), 311.

INTEREST.

See PERSONAL INJURIES.

INTERLOCKING DEVICE.

See CROSSINGS; IMPUTED NEGLIGENCE.

INTERSECTIONS.

See CROSSINGS.

INTERSTATE COMMERCE.

- See CARRIERS OF LIVE STOCK; CONSTITUTIONAL LAW; RAILROADS; TICKETS AND FARES.
- Application and constitutionality of the amendment of March 2, 1902 to the federal safety appliance act. *Wabash R. Co. v. United States* (C. C. A.), 305.
- Application of Hepburn act of June 29, 1906, making it unlawful for a railway carrier to transport in interstate commerce articles "manufactured, mined, or produced by it, etc." *United States v. Delaware & H. Co.* (U. S.), 380.
- Definition of word "used," in Federal Safety Appliance Act of March 2, 1893, requiring common carriers to equip any car "used" in moving interstate traffic with automatic couplers. *Wabash R. Co. v. United States* (C. C. A.), 305.
- Discrimination.**
 - Certain acts of defendant carrier did not subject plaintiff to undue or unreasonable prejudice or disadvantage within the meaning of the interstate commerce act. *Gamble-Robinson Com'n Co. v. Chicago & N. W. Ry. Co.* (C. C. A.), 420.
 - Fact that a carrier, for the purpose of injuring the business of a consignee, or harassing it, subjects it to a prejudice or disadvantage, which is neither undue nor unreasonable, does not create any cause of action therefor. *Gamble-Robinson Com'n Co. v. Chicago & N. W. Ry. Co.* (C. C. A.), 420.
 - Interstate commerce act does not prohibit the giving of all preferences and advantages. *Gamble-Robinson Com'n Co. v. Chicago & N. W. Ry. Co.* (C. C. A.), 420.
 - No discrimination by demand of prepayment of charges, though the carrier does not require such charges to be paid in advance upon freight consigned to others similarly situated. *Gamble-Robinson Com'n Co. v. Chicago & N. W. Ry. Co.* (C. C. A.), 420.
- Hepburn act of June 29, 1906, making it unlawful for a railway carrier to transport in interstate commerce articles "manufactured, mined, or produced by it or under its authority," etc., purpose of. *United States v. Delaware & H. Co.* (U. S.), 380.
- Interstate common carrier is free to exercise all its rights under the common law to the full extent to which such exercise has not been made unlawful by the interstate commerce act. *Gamble-Robinson Com'n Co. v. Chicago & N. W. Ry. Co.* (C. C. A.), 420.

INTERSTATE COMMERCE—Continued.

Purpose of the federal safety appliance act was to promote the safety of interstate passengers and freight and to protect the lives and limbs of railroad employees while engaged in the work of interstate transportation. *Wabash R. Co. v. United States* (C. C. A.), 305.

State Interference.

As the Arkansas statute in question, requiring railroad to furnish cars within a certain period, etc., refers to shipments each one of which would be either interstate or intrastate, it could be enforced within the state as to intrastate business, though it were void as to interstate business. *Oliver & Son v. Chicago, etc., Ry. Co.* (Ark.), 449.

Constitutionality of certain Massachusetts statutes, relating to the transportation of intoxicating liquors into cities. *Commonwealth v. People's Express Co.* (Mass.), 407.

Enforcement of valid state statute will not be stayed merely because it may incidentally affect interstate commerce. *De Rochemont v. New York Cent. & H. R. R.* (N. H.), 285.

Intoxicating liquor which is the subject of an interstate shipment does not come under control of state laws until it passes into possession of the consignee; and such delivery to the consignee may be made at his residence, place of business, or at some common depot of consignment. *Commonwealth v. People's Express Co.* (Mass.), 407.

What Is.

Cars subject to restrictions of federal safety appliance act. *Wabash R. Co. v. United States* (C. C. A.), 305.

Defendant, which merely acted as agent for trunk lines in transferring cars and whose railroad was wholly in Illinois, was engaged in interstate commerce when it moved a train of freight cars, containing one consigned from a point in Illinois to Wisconsin, from the tracks of one railroad to those of another. *Belt Ry. Co. of Chicago v. United States* (C. C. A.), 281.

Evidence, in a prosecution for violation of certain statute relating to transportation of intoxicating liquors into cities, made the question of whether defendant, in delivering a shipment of liquor, was acting as an interstate carrier in delivering an interstate shipment one for the jury. *Commonwealth v. People's Express Co.* (Mass.), 407.

Final link in an interstate shipment may be through a carrier wholly within the terminal state; and such carrier may be another railroad or a horse and wagon. *Commonwealth v. People's Express Co.* (Mass.), 407.

INTOXICATING LIQUORS.

See INTERSTATE COMMERCE.

Carriers liable under certain Massachusetts statutes relating to the transportation of intoxicating liquors into cities. *Commonwealth v. People's Express Co.* (Mass.), 407.

Doing a general express business, within meaning of certain Massachusetts statutes relating to the transportation of intoxicating liquors into cities, what does not constitute. *Commonwealth v. People's Express Co.* (Mass.), 407.

Evidence, in prosecution under certain Massachusetts statutes relating to the transportation of intoxicating liquors into cities, showed that defendant was not conducting a general express business. *Commonwealth v. People's Express Co.* (Mass.), 407.

JOINT LIABILITY.

See ACTIONS.

JOINT TORT FEASORS.

See DAMAGES.

JOINT USE.

See LEASES AND RUNNING POWERS.

JUDGMENTS.

See RAILROADS.

JUDICIAL NOTICE.

Location of two cities, distance between them, and time required to transport a car of freight from one to the other. *Philadelphia B. & W. R. Co. v. Diffendal* (Md.), 364.

JUDICIAL SALES.

Rule that franchises, etc., of a railroad company are not ordinarily subject to division by sale of a part on judicial or tax process may be rendered inapplicable by special legislative authority. *Chicago, etc., Ry. Co. v. City of Janesville* (Wis.), 15.

JURORS.

See TRIAL.

"LAST CLEAR CHANCE."

See CROSSINGS; NEGLIGENCE.

LEASES AND RUNNING POWERS.

See CARRIERS OF PASSENGERS; RAILROADS.

Fact that a train owned by one company and operated by its servants, while being run over a track used jointly with another company, is subject to the rules and regulations of the latter company and the orders of its train dispatcher, does not relieve its owner from liability for injury to a person by such train resulting from its negligent operation. *Chicago, etc., Ry. Co. v. Stepp* (C. C. A.), 207.

Lessor's liability for injury sustained by lessee's employee through his employer's negligence, while using the leased road, where it did not appear whether lease was authorized. *Booth v. St. Louis, etc., Ry. Co.* (Mo.), 119.

Lessor's liability for torts of lessee in operating railroad leased without legislative authority. *Booth v. St. Louis, etc., Ry. Co.* (Mo.), 119.

Liability of railroad for injury due to defective construction of its track, over which it has, without legislative authority, permitted another company to run cars. *Gregory v. Georgia Granite R. Co.* (Ga.), 454.

Not only the company owning a railroad, but a company running trains over it, is responsible to a third person for failure to have a crossing in a busy part of a city protected, notwithstanding a contract between the two placing the duty on the owner. *Louisville & N. R. Co. v. Roth* (Ky.), 610.

Public service corporations cannot lease property without legislative consent. *Booth v. St. Louis, etc., Ry. Co.* (Mo.), 119.

Railroad company which entered into a contract entitling it to use station premises jointly with other companies came under the same duty as to passengers using the premises in connection with the other roads that it owed to its own passengers, and was re-

LEASES AND RUNNING POWERS—Continued.

quired to operate its trains with the same due regard for their safety. *Chicago, etc., Ry. Co. v. Stepp* (C. C. A.), 207.

That trolley wire strung over defendant's track was only 19 feet 5 inches above the track did not, as a matter of law, require defendant to warn employees of another company, which it permitted to use its track, to look out for danger. *Booth v. St. Louis, etc., Ry. Co. (Mo.)*, 119.

LIBEL.

See RAILROADS.

LICENSEES.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; CHILDREN; TRESPASSERS.

Contributory Negligence.

Stockman, while inspecting his stock at intermediate station, was not negligent as a matter of law in not looking again for trains approaching on parallel track while walking near track less than two car lengths. *Christiansen v. Illinois Cent. R. Co. (Iowa)*, 74.

Degree of Care.

Due person using path across railroad right of way. *Lamphear v. New York & H. R. R. Co. (N. Y.)*, 636.

Discovered Peril.

Evidence sufficiently showed that carrier's employees were aware of stockman's danger, when he was standing near parallel track at intermediate station, to justify charge in regard to duty of trainmen after discovery of his peril. *Christiansen v. Illinois Cent. R. Co. (Iowa)*, 74.

Lookouts.

Railroad was bound to know that stockman accompanying their stock might rightfully be on or near the parallel track in question at intermediate station, while their train was standing in railroad yard, and to lookout for them. *Christiansen v. Illinois Cent. R. Co. (Iowa)*, 74.

Who Are.

Boy 11 years of age, when at station to meet delegates to school exhibition, was at most a naked licensee. *Arkansas & L. Ry. Co. v. Sain* (Ark.), 579.

Custom on part of railroad to permit people to go upon its cars merely for the purpose of meeting or seeing incoming passengers, does not constitute them anything more than naked licensees. *Arkansas & L. Ry. Co. v. Sain* (Ark.), 579.

Owner of stock which have escaped on railroad's right of way, while thereon to recover them, is but a bare licensee, as to whom the railroad owes no higher duty than to a trespasser. *Rutherford v. Iowa Cent. Ry. Co. (Iowa)*, 647.

Person accompanying his stock, when struck by train on parallel track at intermediate station, while he was standing near the track to inspect car load of his stock, was neither a trespasser or a mere licensee. *Christiansen v. Illinois Cent. R. Co. (Iowa)*, 74.

Person using path across railroad right of way, which had been constantly used by public for many years, was not a trespasser. *Lamphear v. New York Cent. & H. R. R. Co. (N. Y.)*, 636.

Status of one who goes upon the premises of railroad company, or upon its cars, out of mere curiosity, or for the pleasure of simply meeting or greeting friends or relations, or of seeing strangers. *Arkansas & L. Ry. Co. v. Sain* (Ark.), 579.

LICENSEES—Continued.

Where decedent was killed while crossing railroad track on path used for many years by public for that purpose, the court properly refused to charge that decedent had no license to walk on the tracks, and took the risks incident thereto, and that no duty rested on the railroad except not to intentionally or wantonly injure him. *Lamphear v. New York & H. R. R. Co.* (N. Y.), 636.

LOCAL ASSESSMENTS.

Lands on which are railroad's freight depot and spur tracks are assessable for local improvements, under Wisconsin Laws 1903 p. 688, c. 425. *Chicago, etc., Ry. Co. v. City of Janesville* (Wis.), 15.

LOCAL CARRIERS.

See STATIONS AND DEPOTS.

LOGGING RAILROADS.

See CARRIERS OF PASSENGERS; RAILROADS.

MALICE.

Definition of. *Chicago, etc., Ry. Co. v. Whitten* (Ark.), 152.

MASTER AND SERVANT.

See IMPUTED NEGLIGENCE; LEASES AND RUNNING POWERS; TRESPASSERS.

Appliances.

Duty of master to furnish reasonably safe implements. *Booth v. St. Louis, etc., Ry. Co.* (Mo.), 119.

Assumption of Risk.

Coupling cars on open trestle. *Colorado Midland Ry. Co. v. Brady* (Colo.), 113.

Obvious risks. *Arkansas Midland Ry. Co. v. Worden* (Ark.), 106.

Obvious risks, whether inexperienced or youthful employee assumes. *Arkansas Midland Ry. Co. v. Worden* (Ark.), 106.

Question for jury whether a 20 year old engine hostler assumed risk from operating switch without lights. *Arkansas Midland Ry. Co. v. Worden* (Ark.), 106.

Risk from kind of machinery openly used, and from methods of operating which are observable. *Arkansas Midland Ry. Co. v. Worden* (Ark.), 106.

Contributory Negligence.

Error of judgment in attempting to avoid imminent danger arising from employer's negligence. *Colorado Midland Ry. Co. v. Brady* (Colo.), 113.

Scope of Employment.

Corporation is liable for tort of an agent acting within the general scope of his employment, without previous express authority, or subsequent ratification, though the tort involves malice. *Hypes v. Southern Ry. Co.* (S. Car.), 145.

Injury to pedestrian walking through railroad yards, caused by yard master throwing coal from freight in violation of company's rules, did not render railroad liable, such act being beyond scope of his employment and not beneficial to company. *St. Louis, etc., Ry. Co. v. Lavendusky* (Ark.), 97.

Master is liable for his servant's torts committed wantonly or willfully while on duty, and within the scope of his employment. *Jones v. Seaboard A. L. Ry. Co.* (N. Car.), 139.

MASTER AND SERVANT—Continued.

Question for jury whether flagman was acting within scope of his employment in shooting person who had been attempting to steal ride. *Jones v. Seaboard A. L. Ry. Co.* (N. Car.), 139.

Slander of engineer by division superintendent, liability of railroad for. *Hypes v. Southern Ry. Co.* (S. Car.), 145.

Warn and Instruct.

Duty of master to warn and instruct inexperienced or youthful employee with respect to patent and latent dangers. *Arkansas Midland Ry. Co. v. Worden* (Ark.), 106.

Work Place.

Duty of master to furnish reasonably safe work place. *Booth v. St. Louis, etc., Ry. Co.* (Mo.), 119.

Evidence, in an action for injury sustained while coupling cars on an open trestle, warranted a finding of negligence on the part of the railroad. *Colorado Midland Ry. Co. v. Brady* (Colo.), 113.

No defense, in an action for injury to employee, sustained while coupling cars on an open trestle, that other roads used the same kind of trestle, if the place was not reasonably safe. *Colorado Midland Ry. Co. v. Brady* (Colo.), 113.

Question for jury, in action for injury sustained by switchman while coupling cars on an open trestle, whether railroad negligently failed to furnish him a reasonably safe work place. *Colorado Midland Ry. Co. v. Brady* (Colo.), 113.

MENTAL SUFFERING.

See **BAGGAGE**.

MONOPOLIES.

See **STATIONS AND DEPOTS**.

NEGLIGENCE.

See **ACCIDENTS ON TRACK; CARRIERS; CHILDREN; CONTRIBUTORY NEGLIGENCE; CROSSINGS; FIRES SET BY LOCOMOTIVES; FRIGHTENING TEAMS; IMPUTED NEGLIGENCE; LEASES AND RUNNING POWERS; STOCK, INJURIES TO; STATIONS AND DEPOTS; STREET RAILWAYS; TRESPASSERS.**

Conduct of the parties resulting in injury to one of them is to be judged, not by the fact that injury has resulted from the course pursued, but in the light of the circumstances known or discoverable by ordinary care when the course followed was decided upon. *Stearns v. Boston & M. R. R.* (N. H.), 55.

Definitions.

Gross negligence is failure to exercise slight care. *Louisville & N. R. Co. v. Roth* (Ky.), 610.

Negligence is failure to exercise ordinary care. *Louisville & N. R. Co. v. Roth* (Ky.), 610.

Ordinary care, what constitutes. *Grimm v. Milwaukee Elec. Ry. & L. Co.* (Wis.), 665.

Degree of Care.

General standard of care fixed by law is the care due under the circumstances. *Campbell v. Duluth & N. E. R. Co.* (Minn.), 490.

Last Clear Chance.

Humanitarian doctrine only applies and authorizes a recovery where the injured party is ignorant of or oblivious to the impending danger. *Kinlen v. Metropolitan St. Ry. Co.* (Mo.), 722.

NEGLIGENCE—Continued.**Presumptions.**

Law will never presume negligence on part of any one. *Kinlen v. Metropolitan St. Ry. Co. (Mo.)*, 722.

Proximate Cause.

Railroad company which ran a train past a station at which another train was discharging and receiving passengers at a rate of speed which was per se negligent under the circumstances is liable for an injury to a person of which such negligence was the proximate cause, whether or not the particular injury that resulted could have been foreseen. *Chicago, etc., Ry. Co. v. Stepp (C. C. A.)*, 207.

Question for Jury.

Is question for jury even though facts are undisputed. *Colorado Midland Ry. Co. v. Brady (Colo.)*, 113.

Question for jury, when. *Colorado Midland Ry. Co. v. Brady (Colo.)*, 113.

Usually question for jury. *St. Louis, etc., R. Co. v. Copeland (Okl.)*, 236.

Question of law, when. *Colorado Midland Ry. Co. v. Brady (Colo.)*, 113.

NUISANCES.**What Are.**

Habitually running trains over highway crossing at unsafe rate of speed without giving reasonable signals, railroad may be indicted for. *Commonwealth v. Baltimore & O. R. Co. (Pa.)*, 643.

OPTIONS.

See **RIGHT OF WAY.**

ORDINANCES.

See **STREET RAILWAYS.**

PARENT AND CHILD.

See **IMPUTED NEGLIGENCE.**

PARTIES.

See **COMMON CARRIERS; RIGHT OF WAY.**

PASSES.

See **CARRIERS OF LIVE STOCK; TICKETS AND FARES.**

PENAL STATUTES.

See **CARRIERS OF PASSENGERS.**

PENALTIES.

See **INTOXICATING LIQUORS.**

PERSONAL INJURIES.**Damages.**

Elements of damages, comprehensive instruction as to. *St. Louis, etc., Ry. Co. v. Grimsley (Ark.)*, 170.

Excessive verdict. *St. Louis, etc., Ry. Co. v. Grimsley (Ark.)*, 170.

Judgment for personal injuries negligently inflicted draws interest from its date, and not from judicial demand. *Bommarius v. New Orleans Ry. & Light Co. (La.)*, 548.

PERSONAL INJURIES—Continued.

Under common law in force in South Carolina there can be no recovery for mental suffering in absence of bodily injury. *Black v. Atlantic Coast Line R. Co. (S. Car.)*, 603.

\$3,000 as compensation was not excessive. *Louisville & N. R. Co. v. Roth (Ky.)*, 610.

PLEADING.

See CARRIERS; CARRIERS OF PASSENGERS.

POLICEMAN.

See CARRIERS OF PASSENGERS.

PRIVATE CROSSINGS.

See CROSSINGS.

PRIVATE RAILROADS.

See LOGGING RAILROADS.

PROCESS.

See ATTACHMENT; RAILROADS.

RAILROAD COMMISSIONS.

Authority of the Florida Railroad Commission to enforce a rule requiring railroads to report to such commission by telegram, followed by a written report, of all wrecks and their causes, and names and addresses of the persons killed or injured in such wrecks. *State v. Louisville & N. R. Co. (Fla.)*, 432.

Certain order of Corporation Commission of Oklahoma requiring, a telephone to be installed and maintained in the station in question, will not be disturbed in the supreme court of Oklahoma. *Atchison, etc., Ry. Co. v. States (Okl.)*, 291.

Constitutionality of S. Car. Civ. Code 1002, § 2069, providing that when, in the judgment of the railroad commissioners any improvement in stations, mode of operating a railroad, etc., is reasonable and expedient to promote the security, etc., of the public, they shall give notice in writing to the railroad company, and, if the company fail within 60 days to adopt the suggestion, action may be brought. *Caughman v. Columbia, etc., R. Co. (S. Car.)*, 272.

Order of Railroad Commission, changing freight rates, is void, where no complaint has been made against existing rates, and no hearing has been had thereon. *State v. Railroad Commission (Wash.)*, 302.

Power to make regulation of the schedules of railroads with reference to connections. *State v. Florida East Coast Ry. Co. (Fla.)*, 269.

Powers of railroad commissioners are special and limited, and any reasonable doubt of the existence in such commissioners of any particular power should be resolved against their exercise of such power. *State v. Louisville & N. R. Co. (Fla.)*, 432.

Presumption as to reasonableness of regulations by commission of the schedules of railroads with reference to connections. *State v. Florida East Coast Ry. Co. (Fla.)*, 269.

Prima facie just, reasonable, and correct in section 22, art. 9, of the Constitution of Oklahoma, is a presumption arising upon the finding of the Corporation Commission that the order based upon such facts is presumed on appeal in the supreme court to be just, reasonable, and correct, etc. *Atchison, etc., Ry. Co. v. State (Okl.)*, 291.

RAILROAD COMMISSIONS—Continued.

Statute providing for a reasonable and expedient supervision of railroads by a commission does not take the management of the railroad property away from its owners. *Caughman v. Columbia, etc., R. Co. (S. Car.)*, 272.

Telephone is an indispensable aid in the conduct of the business of a common carrier at any center of population, and has become a necessity, both within the rule of the common law, as well as by the provisions of section 18, art. 9, of the Constitution of Oklahoma. *Atchison, etc., Ry. Co. v. State (Okl.)*, 291.

RAILROADS.

See ATTACHMENT; CARRIERS; JUDICIAL SALES; LEASES AND RUNNING POWERS; LOCAL ASSESSMENTS; MASTER AND SERVANT; RAILROAD COMMISSIONS; RIGHT OF WAY; STREET RAILWAYS.

Describing defendant as "B. & O. Railroad Company," instead of "Baltimore and Ohio Railroad Company" in a summons issued by a justice on a judgment intended to be against the "Baltimore and Ohio Railroad Company" is not such a material variance as to render the execution void. *Stout v. Baltimore & O. R. Co. (W. Va.)*, 20.

Foreign railroad corporation doing business in West Virginia will be treated as domestic corporation for purpose of serving process in suits against it there, and the return of the officer need not show that the place of service was the residence of the person served. *Stout v. Baltimore & O. R. Co. (W. Va.)*, 20.

In accepting charter from state, a railroad impliedly assumes duty of public carrier. *Gregory v. Georgia Granite R. Co. (Ga.)*, 454.

Indictment charging railroad company with frequently and rapidly passing its trains over a highway, whereby it was obstructed and rendered dangerous, charges no offense. *Commonwealth v. Baltimore & O. R. Co. (Pa.)*, 643.

Joint liability, where several railroads rely on and make general and joint use of a tower for signals for a crossing of their roads at grade, for proper operation of tower. *Gorman v. New York, etc., R. Co. (N. Y.)*, 561.

Judgment of a justice against "B. & O. R. R. Company," as described in the summons, instead of "Baltimore & Ohio Railroad Company," the corporation intended, is not such a material variance as to deprive the justice of jurisdiction of the person of the corporation intended to be sued, or vitiate the judgment against it. *Stout v. Baltimore & O. R. Co. (W. Va.)*, 20.

Libel or slander, liability of corporation for act of agent in publishing or uttering. *Hypes v. Southern Ry. Co. (S. Car.)*, 145.

Railroad cannot divest itself of its public duties as a carrier, nor shirk its liabilities, without legislative authority, by allowing another corporation to take possession of its track and operate cars thereon. *Gregory v. Georgia Granite R. Co. (Ga.)*, 454.

Railroad, operating freight train on track crossing at grade another railroad on which a passenger train is running, is liable to injured passenger where its fireman negligently failed to obey signals given by the towerman, and, as a result thereof, its train ran into the passenger train, injuring a passenger, without reference to the question of the fireman's competency. *Gorman v. New York, etc., Co. (N. Y.)*, 561.

What Are.

"Railroad company," within meaning of Hepburn act of June 29, 1906, prohibiting such companies from transporting in inter-

RAILROADS—Continued.

state commerce commodities with which they are associated, or in which they are interested, what constitutes. *United States v. Delaware & H. Co.* (U. S.), 380.

Whether defendant was a general commercial railroad or a logging road was question for jury. *Campbell v. Duluth & N. E. R. Co.* (Minn.), 490.

RAILROADS IN STREETS.

See ACCIDENTS ON TRACK; LEASES AND RUNNING POWERS.

Damages.

Additional tracks laid in a street entitle abutter to additional damages when they are not provided for or contemplated at time of original assessment of damages. *Henry v. Mason City, etc., R. Co.* (Iowa), 11.

Franchise to company to maintain "its railroad track" along a street, under which franchise it had laid a single track, did not authorize the company to lay an additional track 16 years later, where the damage done abutters was based on maintenance of a single track, and where the grant was practically construed by city authorities as giving the right to maintain a single track only. *Henry v. Mason City, etc., R. Co.* (Iowa), 11.

Franchises to use streets are to be constructed in grantor's favor. *Henry v. Mason City, etc., R. Co.* (Iowa), 11.

Negligence in operating train over city grade crossing at prohibited rate of speed, in failing to have flagman at the crossing, and in failing to give statutory signals. *Henry v. Cleveland, etc., Ry. Co.* (Ill.), 48.

Power of steam railroad to require street railway to maintain its trolley wire at a certain height for safe operation of railroad. *Booth v. St. Louis, etc., Ry. Co.* (Mo.), 119.

Remedy of steam railroad where trolley wires are strung too low over its tracks. *Booth v. St. Louis, etc., Ry. Co.* (Mo.), 119.

REMEDIES.

See EMINENT DOMAIN; RIGHT OF WAY.

RIGHT OF WAY.

See EMINENT DOMAIN.

Parties to action against railroad company for trespass upon land in constructing and operating a road over it. *Porter v. Aberdeen & R. F. R. R.* (N. Car.), 1.

Railroad, having failed to exercise option for the conveyance to it of a right of way by making prescribed payment within the time specified, could not compel performance thereof, though it had entered and expended most money in construction of its road. *Spokane, etc., Ry. Co. v. Ballinger* (Wash.), 7.

Remedy of property owner where railroad company has entered land under claim of right to do so, and has constructed a road thereon, and is operating it under legislative charter. *Porter v. Aberdeen & R. F. R. R.* (N. Car.), 1.

Right to recover for trespass by a railroad is personal to him owning the land at the time, and does not pass to his grantee. *Porter v. Aberdeen & R. F. R. R.* (N. Car.), 1.

Where a railroad failed to exercise an option for a right of way within prescribed time, the fact that it had expended much money in construction on the strip, as authorized by the agreement, did not estop the owner from declaring the option forfeited; the

RIGHT OF WAY—Continued.

company being entitled to save such expenditures by exercising its right of eminent domain. *Spokane, etc., Ry. Co. v. Ballinger* (Wash.), 7.

SALES.

See JUDICIAL SALES.

SIGNALS.

See FRIGHTENING TEAMS.

STATIONS AND DEPOTS.

See CARRIERS OF PASSENGERS; LEASES AND RUNNING POWERS; LICENSEES; RAILROAD COMMISSIONS.

Degree of Care.

Duty to keep waiting room in safe condition. *St. Louis, etc., Ry. Co. v. Grimsley* (Ark.), 170.

Duty to keep waiting room in safe condition for benefit of those going there to meet and assist incoming, or to aid outgoing, passengers. *St. Louis, etc., Ry. Co. v. Grimsley* (Ark.), 170.

Local Carriers.

Certain contract between railroad and transfer company gave latter practical monopoly of transfer business at station in question, and was void. *Palmer Transfer Co. v. Anderson* (Ky.), 403.

Platforms.

Carrier is not at fault in placing trunks on its platform at depot, provided sufficient passageway is left on the platform. *Strain v. Vicksburg, etc., Ry. Co.* (La.), 149.

Negligence in piling baggage on station platform whereby passenger was injured, insufficiency of evidence of. *Strain v. Vicksburg, etc., Ry. Co.* (La.), 149.

Speed of train through station grounds as negligence. *Chicago, etc., Ry. Co. v. Stepp* (C. C. A.), 207.

STOCK, INJURIES TO.

See FENCES.

As the animal in question was first seen going to track about 150 feet in front of train, and within the distance the headlight cast a light, and too late to stop the train and prevent the accident, there was no negligence shown on part of railroad. *Wallace v. Oregon Short Line R. Co.* (Idaho), 712.

Care required of railroad to avoid collisions with stock as affected by fact that stock law is in force. *Griffith v. Atlantic Coast Line R. Co.* (S. Car.), 325.

Duty of trainmen when stock is seen near track. *Wallace v. Oregon Short Line R. Co.* (Idaho), 712.

Evidence.

Fact that horse killed by train crossed cattle guard in question was not in itself evidence of its insufficiency. *O'Mara v. Newton & N. W. R. Co.* (Iowa), 67.

That other stock had at other times passed over the same guard. *O'Mara v. Newton & N. W. R. Co.* (Iowa), 67.

That similar cattle guards to the one in question have been found insufficient to turn stock. *O'Mara v. Newton & N. W. R. Co.* (Iowa), 67.

STOCK, INJURIES TO—Continued.**Headlights.**

Railroad is not required to furnish headlights of such power that engineer can see animal sufficient distance ahead of locomotive to enable him to stop train before it reaches such animal. *Wallace v. Oregon Short Line R. Co.* (Idaho), 712.

Presumption of Negligence.

Arising from fact that stock is injured by train. *Griffith v. Atlantic Coast Line R. Co.* (S. Car.), 325.

Mere fact of killing an animal by train is not sufficient to establish negligence on part of trainmen. *Starke v. Chicago, B. & Q. R. Co.* (Neb.), 721.

Under Iowa Code, § 2055, it is not sufficient to make a prima facie case for the owner of the animal to merely show injury to it after it had crossed over a cattle guard from highway to defendant railroad's right of way, but he must further show defendant's failure to have a sufficient fence or cattle guard at such point. *O'Mara v. Newton & N. W. R. Co.* (Iowa), 67.

When jury cannot rest their verdict on presumption alone, but must rest it upon preponderance of entire evidence. *Griffith v. Atlantic Coast Line R. Co.* (S. Car.), 325.

STOCKMEN.

See LICENSEES.

STOPPAGE IN TRANSIT.

See COMMON CARRIERS.

STREET RAILWAYS.

See CARRIERS OF PASSENGERS; CROSSINGS; IMPUTED NEGLIGENCE.

Contributory Negligence.

Attempting to cross track in front of approaching car, with knowledge that its speed was excessive, and under circumstances indicating the impossibility of crossing in safety. *McDivitt v. Des Moines City Ry. Co.* (Iowa), 38.

Crossing track in front of approaching car. *McDivitt v. Des Moines City Ry. Co.* (Iowa), 38.

Crossing track in front of approaching car, person is charged with knowledge of speed of cars permitted by ordinance when. *McDivitt v. Des Moines City Ry. Co.* (Iowa), 38.

Doctrine of sudden peril could not be invoked where plaintiff got into the position in question through his own negligence in walking so fast that he could not stop when he saw car approaching, especially so where it was shown that there was no necessity for his hurry. *Rundgren v. Boston & N. St. Ry. Co.* (Mass.), 685.

Duty of one thinking of crossing track in advance of approaching car to take into consideration the possibility that the car's speed may be excessive and unlawful. *Grimm v. Milwaukee Elec. Ry. & Light Co.* (Wis.), 665.

Fact that one crossing track and a car were both approaching a platform erected for accommodation of passengers, effect of. *McDivitt v. Des Moines City Ry. Co.* (Iowa), 38.

Finding that plaintiff was in exercise of proper care was warranted, in action for injuries received while attempting to cross track in vehicle driven by another person. *Peabody v. Haverhill, etc., Ry. Co.* (Mass.), 26.

STREET RAILWAYS—Continued.

Humanitarian doctrine does not authorize a recovery where person knowingly drives in front of an approaching car when he knows he will not have time to safely cross. *Kinlen v. Metropolitan St. Ry. Co. (Mo.)*, 722.

Knowingly driving across street car track in such close proximity to an approaching car as to be struck before he can cross. *Kinlen v. Metropolitan St. Ry. Co. (Mo.)*, 722.

Of pedestrian struck by street car was question of jury. *Kern v. Des Moines City Ry. Co. (Iowa)*, 29.

Pedestrian, seeing car 375 feet away, is not as a matter of law, bound to look a second time, a few movements thereafter. *Kern v. Des Moines City Ry. Co. (Iowa)*, 29.

Person, struck by street car after alighting from another car, which he saw approaching before he attempted to cross track, was entitled to go to jury on his right to rely on sign on a pole directing motorman to go slowly, and on defendant's practice in causing other cars to slow down or stop under circumstances like that in the case at bar. *Rundgren v. Boston & N. St. Ry. Co. (Mass.)*, 685.

Question for jury where person attempted to cross track in front of approaching car with knowledge of its speed. *McDivitt v. Des Moines City Ry. Co. (Iowa)*, 38.

Right of pedestrian to assume that car will not exceed ordinary speed. *Kern v. Des Moines City Ry. Co. (Iowa)*, 29.

Right to cross track in advance of approaching car. *Grimm v. Milwaukee Elec. Ry. & L. Co. (Wis.)*, 665.

Street railway cannot by its own failure to comply with its rules and customs, place one who is rightfully on the street in a hazardous position, and then claim that in extricating himself he did not act with the prudence which one would use under ordinary circumstances. *Kern v. Des Moines City Ry. Co. (Iowa)*, 29.

Struck by car approaching at excessive speed, while attempting to cross track in front of it. *McDivitt v. Des Moines City Ry. Co. (Iowa)*, 38.

Where street railway by its own negligence throws pedestrian off his guard or puts him in peril, the conduct of the pedestrian will not be regarded as contributory negligence under any circumstances. *Kern v. Des Moines City Ry. Co. (Iowa)*, 29.

Discovered Peril.

In determining whether or not employees in charge of a street car did all in their power to avert injury after discovering a traveler's perilous position, or by ordinary care could have discovered it, it is proper for the jury to consider the speed of the car and whether the bell was wrung. *Kinlen v. Metropolitan St. Ry. Co. (Mo.)*, 722.

Motorman's duty when he sees, or, by ordinary care, can see a buggy hanging to and sliding along the rail in front of his car. *Kinlen v. Metropolitan St. Ry. Co. (Mo.)*, 722.

Enforcement of continuance by a Hawaiian street railway company of a ten-minute schedule on certain of its lines is not within the limits of the judicial power, and is totally inconsistent with the power to regulate the management of the street railway, which is ultimately vested by certain statutes in the executive authorities. *Honolulu Rapid Transit & L. Co. v. Hawaii (U. S.)*, 89.

Evidence.

Declarations of motorman as evidence to show railway's liability under the last clear chance rule, and to negative decedent's negligence. *Kern v. Des Moines City Ry. Co. (Iowa)*, 29.

LEASES AND RUNNING POWERS—Continued.

quired to operate its trains with the same due regard for their safety. *Chicago, etc., Ry. Co. v. Stepp* (C. C. A.), 207.

That trolley wire strung over defendant's track was only 19 feet 5 inches above the track did not, as a matter of law, require defendant to warn employees of another company, which it permitted to use its track, to look out for danger. *Booth v. St. Louis, etc., Ry. Co.* (Mo.), 119.

LIBEL.

See RAILROADS.

LICENSEES.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; CHILDREN; TRESPASSERS.

Contributory Negligence.

Stockman, while inspecting his stock at intermediate station, was not negligent as a matter of law in not looking again for trains approaching on parallel track while walking near track less than two car lengths. *Christiansen v. Illinois Cent. R. Co.* (Iowa), 74.

Degree of Care.

Due person using path across railroad right of way. *Lamphear v. New York & H. R. R. Co.* (N. Y.), 636.

Discovered Peril.

Evidence sufficiently showed that carrier's employees were aware of stockman's danger, when he was standing near parallel track at intermediate station, to justify charge in regard to duty of trainmen after discovery of his peril. *Christiansen v. Illinois Cent. R. Co.* (Iowa), 74.

Lookouts.

Railroad was bound to know that stockman accompanying their stock might rightfully be on or near the parallel track in question at intermediate station, while their train was standing in railroad yard, and to lookout for them. *Christiansen v. Illinois Cent. R. Co.* (Iowa), 74.

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Where decedent was killed while crossing railroad track on path used for many years by public for that purpose, the court properly refused to charge that decedent had no license to walk on the tracks, and took the risks incident thereto, and that no duty rested on the railroad except not to intentionally or wantonly injure him. *Lamphear v. New York & H. R. R. Co.* (N. Y.), 636.

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LOCAL CARRIERS.

See STATIONS AND DEPOTS.

LOGGING RAILROADS.

See CARRIERS OF PASSENGERS; RAILROADS.

MALICE.

Definition of. *Chicago, etc., Ry. Co. v. Whitten* (Ark.), 152.

MASTER AND SERVANT.

See IMPUTED NEGLIGENCE; LEASES AND RUNNING POWERS; TRESPASSERS.

Appliances.

Duty of master to furnish reasonably safe implements. *Booth v. St. Louis, etc., Ry. Co.* (Mo.), 119.

Assumption of Risk.

Coupling cars on open trestle. *Colorado Midland Ry. Co. v. Brady* (Colo.), 113.

Obvious risks. *Arkansas Midland Ry. Co. v. Worden* (Ark.), 106.

Obvious risks, whether inexperienced or youthful employee assumes. *Arkansas Midland Ry. Co. v. Worden* (Ark.), 106.

Question for jury whether a 20 year old engine hostler assumed risk from operating switch without lights. *Arkansas Midland Ry. Co. v. Worden* (Ark.), 106.

Risk from kind of machinery openly used, and from methods of operating which are observable. *Arkansas Midland Ry. Co. v. Worden* (Ark.), 106.

Contributory Negligence.

Error of judgment in attempting to avoid imminent danger arising from employer's negligence. *Colorado Midland Ry. Co. v. Brady* (Colo.), 113.

Scope of Employment.

Corporation is liable for tort of an agent acting within the general scope of his employment, without previous express authority, or subsequent ratification, though the tort involves malice. *Hypes v. Southern Ry. Co.* (S. Car.), 145.

Injury to pedestrian walking through railroad yards, caused by yard master throwing coal from freight in violation of company's rules, did not render railroad liable, such act being beyond scope of his employment and not beneficial to company. *St. Louis, etc., Ry. Co. v. Lavendusky* (Ark.), 97.

Master is liable for his servant's torts committed wantonly or willfully while on duty, and within the scope of his employment. *Jones v. Seaboard A. L. Ry. Co.* (N. Car.), 139.

TICKETS AND FARES—Continued.

Question for jury whether conductor had had reasonable time after leaving the station in which to take up tickets. *Louisville & N. R. Co. v. Seale* (Ala.), 594.

Transfers.

Passengers must secure street car transfers, and a conductor on one car need not accept their statements that they have paid fare to conductor of another car. *People v. Detroit United Ry.* (Mich.), 158.

Was province of court, under the circumstances, to construe the terms of the ticket in question, as a matter of law responsive to the testimony, even if strict pleading required defendant to plead a limitation of liability stated in the ticket. *Black v. Atlantic Coast Line R. Co.* (S. Car.), 603.

TRANSFERS.

See TICKETS AND FARES.

TRESPASS.

See RIGHT OF WAY.

TRESPASSERS.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; CHILDREN; LICENSEES; MASTER AND SERVANT.

Burden of Proof.

Was on trespasser on train to show not only that he was in a perilous position, but that such situation was discovered by defendant's employees, and that they failed, after that, to exercise ordinary care to avoid injuring him. *Arkansas & L. Ry. Co. v. Sain* (Ark.), 579.

Discovered Peril.

Rule making railroads liable for injuries to trespassers caused by failing to exercise ordinary care to avoid injuring them after their perilous situation has been discovered does not apply where the acts of their servants causing the injuries are beyond their authority. *St. Louis, etc., Ry. Co. v. Lavendusky* (Ark.), 97.

Who Are.

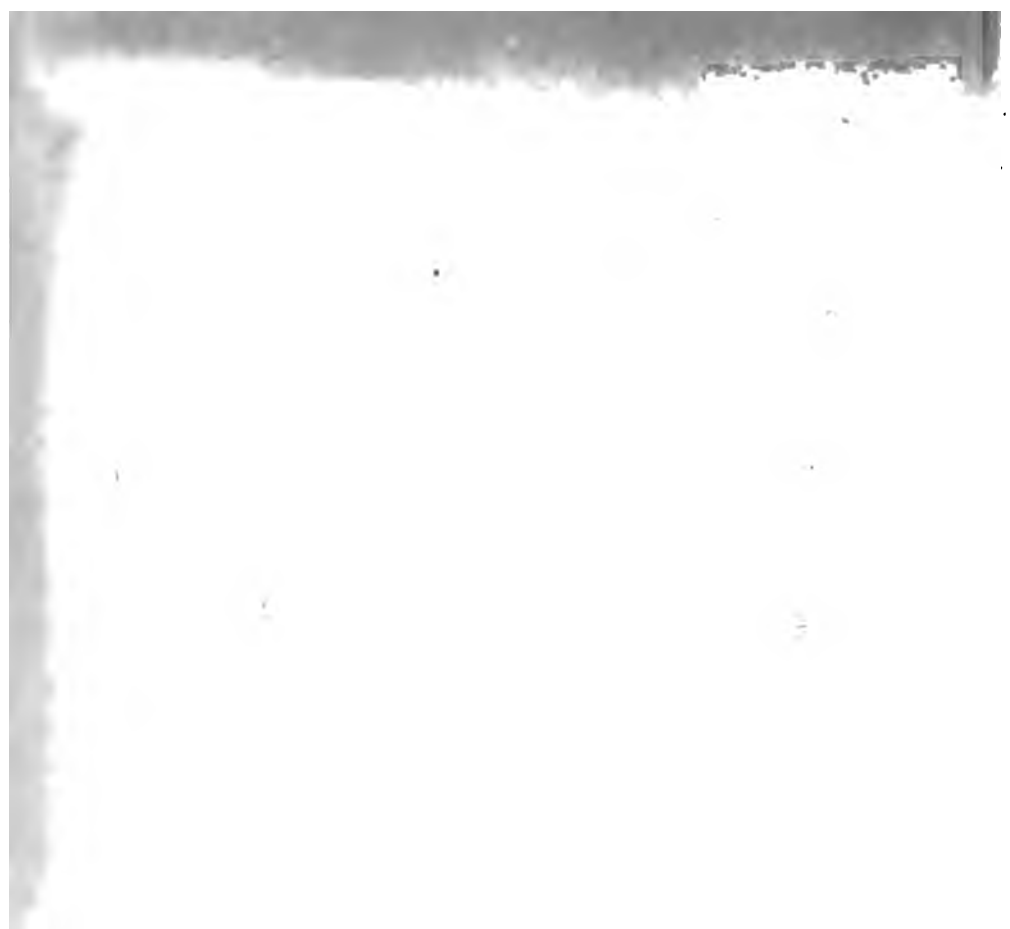
One walking along path in railroad yard. *St. Louis, etc., Ry. Co. v. Lavendusky* (Ark.), 97.

TRIAL.

That two jurors who had experience in running engines talked with the other jurors about their conclusion from their experience in regard to the fire in question was not ground for new trial. *Lillard v. Chicago, etc., Ry. Co.* (Kan.), 84.

VARIANCE.

See RAILROADS.



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